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91-1661

Supreme Court, U.S.
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CASE NO.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL FERRIS
PETITIONER

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; RICHARD C. POND IN HIS CAPACITY AS MEMBER OF SAID BOARD AND INDIVIDUALLY; MAXINE ALBERS AND R. W. HOLMES IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF SAID BOARD AND INDIVIDUALLY.
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III.

PETITION FOR WRIT OF CERTIORARI

Paul Ferris
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March 1992.

QUESTION PRESENTED FOR REVIEW

Whether the unlawful imposition of a general property tax by legislative act of a board of county commissioners violates a citizen's right to a Republican Form of Government as guaranteed by Article IV, Section 4 of The United States Constitution for which a citizen's right to petition for redress may not be impaired.

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SUPREME COURT
OF THE UNITED STATES

PAUL FERRIS
Petitioner
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III.

Petitioner Paul Ferris petitions for a Writ of Certiorari to the Colorado Court of Appeals affirmation of Colorado District Court dismissal of his complaint for declaratory and injunctive relief against the Board of County Commissioners of the County of Mesa, State of Colorado, and the commissioners individually.

OPINIONS BELOW

The unreported opinion of the Colorado Court of Appeals and order on rehearing are reprinted in the appendix. No. 89CA2137.

Oral findings and conclusions of Colorado

District Court for dismissal and two subsequent unreported written orders affirming oral dismissal are reprinted in the appendix. No. 89CV204.

Unreported orders of the Colorado Supreme Court denying certiorari and striking petition to reconsider are reprinted in the appendix. No. 91SC370.

JURISDICTION

The Colorado Court of Appeals, Division III, on April 25, 1991 entered judgment affirming district trial court dismissal. Rehearing was denied May 23, 1991.

Petition for Certiorari by Colorado's Supreme Court was denied Nov. 12, 1991.

Time for filing a petition in this Court has been extended to and including March 11, 1992. Application No. A-544.

Jurisdiction of The United States Supreme Court is invoked by 28 U.S.C. Sec. 1257. Also 28 U.S.C. Sec. 2403(b).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves these United States Constitution provisions: The Republican Guarantee of Article IV, Section 4; the right to petition Government for a redress of Grievances of Amendment I; the Due Process Clause of Amendment V, the Due Process and Equal Protection Clauses of Amendment XIV, Section 1.

This case involves the Federal Enabling Act to Colorado State Government, Sec.4.

This case involves the Equal Justice provision of Colorado Constitution, Article II, Section 6.

This case involves these Colorado Statutes: 24-6-401 (State Open Meetings Law); Part 3 of Article 1, Title 29; 29-9-101 (Public Meetings Law), 39-1-113, 39-10-114.

The pertinent text of these constitutional provisions and the statutes are set forth in the separate appendix volume.

STATEMENT OF THE CASE

In Fall, 1988, Respondent Board of County Commissioners of Mesa County (Com'rs) implemented exception procedures to collect revenues in excess of the property tax revenue increase limitation at 29-1-301, C.R.S. and adopted a 4-mill excess levy for budget year 1989 for capital expenditures, debt service for capital expenditures, and general operating budget[1] pursuant solely to "truth in taxation" public disclosure procedures at 29-1-303, C.R.S.[2] Petitioner Paul Ferris (Ferris) and others apprised Com'rs, on the record, of then known defects of procedure at public disclosure hearings held, prior to Com'rs' approval of the excess amount of revenue and adoption of the excess levy. Additionally Ferris gave Com'rs written notice and complaint on Dec 1, 1988, detailing the then known is-

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[1] Record: Exhibits C, D, 1, and 2.
[2] Record: Exhibit 1, Sections K, OO.

sues of this action.[3] Receiving no response, Ferris filed suit March 20, 1989, seeking declaratory and injunctive relief as to the legality and validity of procedures implemented and the resultant excess levy. Ferris brought this action as citizen/registered elector/property owner/property taxpayer, alleging injury individually to his several personages, though not necessarily same injury to each individual status, from the excessive governmental conduct subject of the Complaint.[4]

The Complaint was filed pursuant to United States Constitution First Amendment right "to petition the Government for a redress of grievances" and corollary Article II Section 6 Colorado Constitution guaran-

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[3] Record, Vol.I, COMPLAINT AND PETITION FOR REDRESS (stricken), p.26-30.

[4] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.4-5, 17-18; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.154, 156; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.144-145.

tee of "a speedy remedy for every injury to person, property, or character,"[5] alleging that Com'rs' legislative acts complained of were not within their lawful discretion, and therefore a cause of action and redress was available directly through the courts. The nature of the grievance was that the Com'rs' legislative imposition of a general property tax was by unlawful implementation of procedures, lawfully insufficient procedure and notice, and in violation of requirements of various applicable Colorado statutory public meetings/hearings requirements. "Since the Board does not enjoy discretion to abrogate citizens' rights, nor to violate laws of the General Assembly, including specific laws of procedure and process for taxation, a cause of action does lie in this case. The

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[5] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.5, 6; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.153.

Court here is not asked to substitute its judgment for that of the Board. The Court's jurisdiction is invoked for a determination of: (a) Did the Board violate law, binding upon the Board, in the matter of "truth in taxation" complained of? And if so, (b) by doing so, were rights, privileges, and/or immunities of Mesa County citizens, as a class, violated? If so, (c) were Plaintiff's rights, privileges, and/or immunities, as an individual, violated? (d) remedies."[6]

In addition to direct monetary injury, the Complaint alleged injury by virtue of deprivation of immunity of "no taxation without representation" and deprivation of rights, privileges and immunities secured by United States Constitution, Fourteenth

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[6] Record, Vol.I: BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.147; Also, COMPLAINT AND PETITION FOR REDRESS (stricken), p.20, 21.

Amendment and by 42 U.S.C. 1983.[7]

Relief was sought by means of Colorado statutory provisions for obtaining a declaratory judgment.[8] Ferris argued declaratory order and relief were available and the proper means of redress for these claims of unlawful imposition of a general property tax by legislative act, and for obtaining the relief sought here.[9] Nov. 8, 1989, at oral evidentiary hearing held solely on Ferris' motion for injunctive relief, the district court denied temporary injunction and orally dismissed the complaint pursuant to one or more of Com'rs' several motions for summary dismissal, prior to and without any hearing of said mo-

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[7] Record, Vol.I: BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.144, 145, 147; COMPLAINT AND PETITION FOR REDRESS (stricken), p.17, 18, 21.

[8] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.8-10, 22-24; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.153, 160-161; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p. 146-147.

[9] Record: Vol.III, p.107 @line 17 - p.108 @line 22.

tions, such dismissal including claims of other than monetary injury, on ground of failure to exhaust administrative remedies, citing that monetary relief was available to Ferris through statutory procedure for administrative abatement and refund of property taxes at 39-1-113 and 39-10-114, C.R.S. (A&R), and that the existence of that remedy made its exercise a condition precedent to commencing a suit for declaratory order and relief.[10] Nov. 14 and Dec. 8, 1989, the trial judge affirmed oral dismissal by written order, citing solely as ground that Ferris, as a property taxpayer, had not exhausted the administrative remedy of A&R.

Ferris appealed District Court dismissal and denial of temporary injunction to the Colorado Court of Appeals. Appeal alleged error in findings of fact and conclusions

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[10] Record: Vol.III, p.111 @line 5-20.

of law, including as to facts and evidence admitted at the Nov. 8, 1989 evidentiary court hearing and those reasonable inferences, favorable to Ferris' position, that could be drawn from evidence, testimony, and facts, admitted and controverted, such that would defeat Com'rs' motions for summary judgment. That dismissal of claims made in the complaint was error was basis of appeal. Appeal raised additional federal questions of whether a state can limit means of redress for unlawful imposition of a prospective general property tax by legislative act of a board of county commissioners to the administrative remedy of A&R for individual property taxes, to the exclusion of all other remedies and statuses of citizens without violating the Equal Protection Clause of the Fourteenth Amendment United States Constitution; whether Ferris' First Amendment United States Constitution right to petition for redress of

grievances in these circumstances could be impaired without violating the United States Constitution guarantee of a republican form of government; whether administrative A&R procedure provides meaningful relief meeting minimum United States Constitution due process requirements of clear and certain remedy.

In 89CA2137 opinion not selected for publication, the Court of Appeals opined: The trial court's detailed oral findings and order disposed of the entire claim for relief, therefore, all of Ferris' contentions could be considered on appeal; county commissioners must adhere to a mandatory procedure in order to levy excess property taxes; violation of procedure constitutes an "irregularity in levying" as contemplated by statutes at 39-1-113 and 39-10-114, C.R.S., procedure for abatement and refund of property taxes (A&R); assuming Com'rs here acted in derogation of the pertinent

statutory guidelines, the tax is an illegal levy to which A&R statutes apply; circumstances here do not except Ferris from first exhausting administrative remedy of A&R, because Com'rs might cure the defect by imposing a subsequent legal levy should the tax levy be determined illegal on administrative review; it was unnecessary to address Ferris' other contentions of error (including alleged injuries and claims for relief in statuses other than property taxpayer) because of disposition of "taxpayer's" claims on jurisdictional grounds.

The Colorado Supreme Court denied Ferris' Petition for a Writ of Certiorari to the Colorado Court of Appeals.

The Federal question sought to be reviewed here is to the fundamental constitutional ground upon which the claims at issue before the trial court were based. Aspects of such question were therefore squarely

raised in the Complaint, at the outset of this action, and those same aspects and others have been subsequently raised, as error, to the Court of Appeals on appeal and to the Colorado Supreme Court in denied petition for discretionary review.

"A PUBLIC HEARING SHALL BE HELD ON A PROPOSAL TO INCREASE YOUR PROPERTY TAXES" was sole notice caption published to advertise all public hearings held (Sept. 20, Nov. 22 and 25, 1988) for Com'rs legislative adoption of "truth in taxation" procedure and the excess levy.[11] Ferris argued, as error, to the Court of Appeals: That the notice caption published for the Sept. 20, 1988 hearing, admitted into evidence just prior to oral trial court dismissal, was other than the express and exact notice caption mandated by statute for advertisement of a lawful first hearing for adoption

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[11] Record: Exhibit 1, Sections B, MM, NN.

of that procedure, "A PUBLIC HEARING SHALL BE HELD TO CONSIDER ADOPTION OF A TAXING PROCEDURE TO INCREASE YOUR PROPERTY TAXES", as per C.R.S. 29-1-303(1)(b); that since same express notice caption for adoption of the procedure was never published, the subsequent resolution to implement C.R.S. 29-1-303 procedure was not adopted at a lawfully-noticed first hearing; that Com'rs were therefore without jurisdiction to proceed with adoption of an increased levy by that procedure, and any levy adopted was invalid as per C.R.S. 29-1-303(1)(a)(b), (3); 24-6-402(4); 29-9-101(2).[12]

The complaint sought a declaratory judgment in the trial court that other notice published did not meet express statutory requirements of procedure at 29-1-303(4), (6) C.R.S. nor substantive "full and time-

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[12] APPELLANT'S BRIEF ON APPEAL (stricken), p.51-53, 107-108; CONDENSED APPELLANT'S BRIEF ON APPEAL, p. 14-15, 24-25.

ly" notice requirements at 24-6-402(2), C.R.S. Declaratory order and injunctive relief were sought by express statutory means provided at 24-6-402(6).[13] Same arguments were raised, as trial court error, to the Court of Appeals.[14] Notice of the Nov. 25, 1988 hearing was published Nov. 24 (Thanksgiving Day) and Nov. 25, 1988, the day of the hearing.[15] Neither time nor place of the November 25, 1988 hearing was published in the notice for the Sept. 20 or Nov. 22, 1988 hearings.[16] Ferris argued: That the express statutory requirement is that notice must be published on two separate dates for any hearing, for a hearing time and place fixed in the advertisement,

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[13] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.15-17, 22; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.160; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.142-144.

[14] CONDENSED APPELLANT'S BRIEF ON APPEAL, p.16-17, 24-25; APPELLANT'S BRIEF ON APPEAL (stricken), p.68-77, 107-108.

[15] Record: Exhibit 1, Section NN.

[16] Record: Exhibit 1, Sections B, MM.

the second notice expressly not more than eight days prior, and the first implicitly not less than eight days prior and expressly not less by other applicable statutory notice requirements; that since notice published did not meet such requirements, the resolution for an increased levy was not approved at hearing held pursuant to lawful notice and was therefore invalid.

The trial court orally found that the Com'rs provided proper notice of the November 22, 1988 hearing, and they

> ". . . didn't need to give anybody notice that the hearing was being continued at all. They gave as much notice as they could that the hearing was being continued to November 25, 1988, and exceeded the statutory requirements."[17]

Ferris additionally sought a declaratory

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[17] Record: Vol.III, p.110 @l.15-20.

judgment in the trial court that the exception procedure at 29-1-303, C.R.S. was for obtaining excess general operating budget revenues for one budget year only, and could not be implemented to obtain excess revenues for capital expenditures or prospective revenues, as it was here, because of the express wording of that statutory procedure, the availability of other alternative exception procedures, also at Part 3 of Article I, Title 29, C.R.S., expressly for obtaining excess revenues for such other purposes, and express statutory restrictions placed upon raising excess revenues for such other purposes.[18] Same issues were raised as error to the Court of Appeals.[19]

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[18] Record: COMPLAINT AND PETITION FOR REDRESS (stricken), p.10-17; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.138-144.

[19] APPELLANT'S BRIEF ON APPEAL (stricken), p.48-51, 53-68, 77-88, 107-108; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.13-14, 15-16, 17-20, 24-25.

The trial court orally found that procedure at 29-1-303, C.R.S. was the applicable one in these circumstances.[20] As to the above claims of unlawful taxing procedure under Part 3, Article 1, Title 29, C.R.S., raised on appeal as error, the Court of Appeals did not contemplate the factual issues of this case in light of the statutory requirements, apparently because of disposition of all claims on jurisdictional ground of failure to exhaust administrative remedy of A&R as a property taxpayer.[21] The Court of Appeals generally found this action was of the nature for which A&R procedure was intended.[22]

Ferris raised the issue to the Court of Appeals, as trial court error, that un-controverted evidence and testimony were admitted at the Nov. 8, 1989 trial court

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[20] Record: Vol.III, p.109 @line 18.
[21] 89CA2137 Opinion, p.7.
[22] 89CA2137 Opinion, p.5.

hearing from which a reasonable inference, if not proof, could be drawn favorable to the Ferris position that Com'rs' adoption of an excess mill levy at "truth in taxation" hearing was a mere "rubber stamp" of decisions made outside of public hearing and out of public "hearing."[23] The same claim had been made a part of the Complaint[24], and was argued in pleadings to vacate summary trial court dismissal.[25] At the November 25, 1988 "truth in taxation" hearing, Commissioner Pond had moved and read into the record a resolution to adopt a 4-mill increase levy and read the final vote prior to any public vote by

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[23] APPELLANT'S BRIEF ON APPEAL (stricken), p.91-110; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.21-26.

[24] Record, Vol.I: COMPLAINT AND PETITION FOR REDRESS (stricken), p.15-17; AMENDED COMPLAINT AND PETITION FOR REDRESS, p.158-159; BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.142-144.

[25] Record, Vol.II: PLAINTIFF'S OBJECTION AND PETITION FOR REDRESS WITH AFFIDAVIT, p.412, p.415.

Com'rs.[26] Un-controverted testimony by Commissioner Pond was admitted at trial court hearing that during a recess outside the November 25, 1988 "truth in taxation" hearing, "There was a debate between the commissioners as to what mill levy might be established."[27] Subsequent to such testimony, the trial court orally ruled that 24-6-401, C.R.S., the State Open Meetings Law, was inapplicable to county commissioners; that 29-9-101, C.R.S., the Public Meetings Law, was the applicable statute and was observed; that the resolution to approve an excess mill levy was adopted at a properly noticed open and public session.[28]

Ferris raised the argument to the trial court, orally and in his pleas to recon-

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[26] Record: Vol.III, p.39 @l.21-p.40 @l.5; Plaintiff's Exhibit C, tapes 5, 6, C1; Defendants' Exhibit 2, 11/25/88, p.37.

[27] Record, Vol.III: p.24 @l.8; p.44 @l.16; p.45 @l.6; p.46 @l.6.

[28] Record: Vol.III, p.109 @l.24 - p.110 @l.10.

sider dismissal[29], and at length to the Court of Appeals as trial court error[30], that neither debate of proposed public policy by Com'rs outside public hearing, proposals not presented in public hearing, where a public vote follows same, nor public "rubber stamping" of final policy decisions reached outside of public hearing, were within the purpose of "truth in taxation" public disclosure procedures and violated express wording at: 29-1-303(5), (6), C.R.S., "truth in taxation" procedure; 24-6-402(1), C.R.S., the State Open Meetings Law; 29-9-101(1), C.R.S., the Public Meetings Law. Ferris argued that all of these statutory public hearings/meetings statutes

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[29] Record: Vol.III, p.108 @l.17-21. Vol.II: PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.382; PLAINTIFF'S OBJECTION AND PETITION FOR REDRESS WITH AFFIDAVIT, p.412, 415; PLAINTIFF'S MOTION FOR C.R.C.P. RULE 11 SANCTIONS, p.420-421.

[30] APPELLANT'S BRIEF ON APPEAL (stricken), p.95-110; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.22-25.

were applicable, and the resolution approving an excess property tax levy was adopted contrary to requirements of each and was expressly invalidated by same statutes at 29-1-303(3), (5), (6); 24-6-402(4), 29-9-101(2), C.R.S. Upon reconsideration of oral dismissal, dismissal of all claims, the trial court twice subsequently affirmed such dismissal by written order, but there cited solely, as grounds, failure to exhaust administrative remedy of A&R before bringing the action[31] - same failure jurisdictionally precluding hearing of Ferris' claims as to Com'rs' violation of statutory public meetings/hearings requirements[32]. Ferris argued, as trial court error, to the Court of Appeals that reasonable inferences, if not proof, of violation of "truth in taxation" hearings requirements, of the State Open Meetings Law, and/ or the Public

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[31] Record, Vol.II: ORDER p.424; ORDER, p.436.
[32] Record, Vol.II: ORDER, p.436.

Meetings Law could be drawn from testimony and admitted and controverted material facts, such inferences of violation negating trial court dismissal by summary judgment for failure to exhaust administrative remedies, and defeating Com'rs' motions for summary judgment on issues of public meetings.

The Court of Appeals did not address these contentions of error regarding public meetings/hearings statutes because of disposition of "taxpayer's" (Ferris) claim on the same jurisdictional ground as that for trial court's dismissal, for failure to exhaust administrative remedy of A&R as a property taxpayer.[33]

Ferris raised the contention of trial court error to the Court of Appeals that in these circumstances of unlawful imposition of a general property tax by legislative

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[33] 89CA2137 Opinion p.7.

act of Com'rs, where state citizens are conferred statutory right to county commissioners' compliance with the various public meetings hearings requirements and express statutory means of redress and remedy as sought here[34] for Com'rs' noncompliance with same, that dismissal of all Ferris' claims, in all statuses, for failure to exhaust an administrative remedy for direct monetary relief only, as a property taxpayer, is effectual denial of First Amendment United States Constitution right to petition for redress in other statuses because he might have an administrative avenue of monetary relief in one status, property taxpayer. Ferris argued that such a denial of a protected right is not consistent with due process, and is repugnant to the Equal Protection Clause of United States Consti-

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[34] Record: Vol.III, p.108 @ l.15-22; Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.397, 402, 390-391.

tution, Fourteenth Amendment, Article II, Section 6 of Colorado Constitution, and the form of republican government in Colorado and the United States.[35] The Court of Appeals did not address this contention of error.[36]

The argument was made to the trial court prior to and after dismissal[37], and raised as error to the Court of Appeals[38] that the administrative remedy of A&R is not only inappropriate for redress of the unlawful legislative acts at issue and especially so for obtaining the non-monetary relief sought in the Complaint, but that

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[35] APPELLANT'S BRIEF ON APPEAL (stricken), p.46-48; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.11-12.

[36] 89CA2137 Opinion p.7.

[37] Record: Vol.III, p.108 @l.5-22. Vol.I, COMPLAINT AND PETITION FOR REDRESS (stricken), p.20-21; Vol.I, BRIEF IN SUPPORT OF AMENDED COMPLAINT AND PETITION FOR REDRESS, p.147; Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.384-400.

[38] APPELLANT'S BRIEF ON APPEAL (stricken), p.28-36; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.6-9.

such, if it is sole remedy available for redress of a grievance of any unlawful legislative conduct of a board of county commissioners in imposing a general property tax, where same commissioners are judge in their own cause, is violative of the doctrine of separation of government powers. The contention was raised in the trial court[39] and argued at length to the Court of Appeals[40], as error, that monetary relief available through administrative A&R procedure did not meet minimum Federal Due Process requirements of clear and certain remedy; that even for direct monetary injury to the status of property taxpayer the relief was not necessarily meaningful, as any taxes abated or refunded could simply

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[39] Record, Vol.III, p.107 @line 17-25. Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.389, 398-399.

[40] APPELLANT'S BRIEF ON APPEAL (stricken), p.36-43; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.9-11.

be re-levied and collected the subsequent tax year; that if the revenue resultant of the excess levy were made a prospective part of the county's revenue base, a taxpayer seeking remedy would be required to pursue the administrative A&R procedure each future year derivative levies were applied; that the statutes provided no means for overall cure of the unlawful legislative conduct subject of claims in the complaint. Ferris argued to the trial court[41] and to the Colorado Court of appeals[42] that to allow the Com'rs to legislatively impose a general property tax levy in excess of their authority is "taxation without representation" and that to restrict redress for such unlawful legisla-

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[41] Record: Vol.II, PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' ALTERNATIVE MOTIONS FOR JUDGMENT ON THE PLEADINGS AND/OR SUMMARY JUDGMENT, p.400.

[42] APPELLANT'S BRIEF ON APPEAL (stricken), p.81; CONDENSED APPELLANT'S BRIEF ON APPEAL, p.19; APPELLANT'S PETITION FOR REHEARING, p.5-6.

tive acts to administrative procedure for piecemeal individual monetary damages, available to property taxpayers only, is repugnant to United States and Colorado Constitutions. The trial court found that Ferris has available a simple remedy of money damages through A&R.[43] The Court of Appeals opined that such a construction would render the statutory language of A&R meaningless and circumstances here do not except Ferris from first exhausting such administrative remedy, because the Commissioners might cure the defect by imposing a subsequent legal levy were the tax levy determined illegal on administrative review.[44]

Each and all the above stated claims and arguments made in the trial court and raised, as error, to the Colorado Court of Appeals were raised in Ferris' denied Peti-

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[43] Record, Vol.III: p.111 @l.5-20.
[44] 89CA2137 Opinion, p.4-5.

tion to The Colorado Supreme Court for a Writ of Certiorari to the Colorado Court of Appeals' affirmation of trial court dismissal. Ferris summarized to the Colorado Supreme Court that the Court of Appeals' zeal to protect statutory language of A&R ratifies the excessive and infirm legislative conduct at issue, resulting in an unlawful tax levy for which individual monetary relief afforded through administrative A&R procedure is sole remedy, regardless of other non-monetary injury to statuses other than and including property taxpayer; that such holding has rendered nugatory, in these circumstances, statutory guarantees of property tax revenue increase limitation and public meetings/hearings, and Constitutions' guarantees and principles of separation of powers, equal protection, no taxation without representation, and due process right to clear, certain remedy and meaningful relief; that therefore for ad-

ministrative A&R procedure to be sole remedy is impermissible under United States Constitution.[45]

REASONS FOR GRANTING THE PETITION

The legislative acts of the state government officials and the resultant tax, subject of this cause of action are "so contrary to the root philosophy of a Republican Form of Government as might cause this Court to resort to the guarantee clause of Article IV Section 4 of the United States Constitution." This case presents a fundamental constitutional issue, is of general importance, and concerns the important private right to petition the government for a redress of grievances against unconstitutional legislative acts of state government. The Colorado Court of Appeals has decided this important question of federal law in a way not in harmony with United

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[45] APPELLANT'S PETITION FOR WRIT OF CERTIORARI, p.5.

States Constitution, Article IV, Section 4, nor with other rights of Due Process and Equal Protection guaranteed by the Fourteenth Amendment. The question of whether the unlawful imposition of a general tax by legislative act of local state government officials, in excess of statutory limitations imposed on their taxing power, violates the constitutional guarantee of a republican form of state government, and whether redress for such may be impaired and limited solely to an administrative proceeding for individual direct monetary injury to taxpayers, has not been, but should be, settled by this Court. Because the tax levy was adopted in a manner facially in excess of statutory authority, the core issue of this petition is sovereignty of law. While tangential arguments of due process and equal protection can be made in attempting to reach the sovereignty doctrine, it can only be reached directly, in

this case, through the Guarantee Clause. This Court could here reconsider the doctrine that all questions involving the Guarantee Clause are by definition political.

I. THE REPUBLICAN GUARANTEE

The issue presented here is that the legislative conduct of state government officials in the adoption of a general property tax, and the resultant tax, are violative of the express laws of the state, and therefore such circumstance is violative of the republican guarantee at Article IV, Section 4, United States Constitution. Adjudicating sovereignty of state law does not present a challenge that Colorado state government is not republican in form - challenging the state as a state. The challenge is to the legality of governmental conduct and to the tax as a tax - That the tax and conduct is contrary to congressional guarantees enabling statehood. As to various claims of lawfully insufficient notice and

procedure, the law and facts facially show that the challenged legislative enactment of a general tax exceeds the specific statutory, and therefore constitutional, limitations imposed upon the Com'rs' taxing and spending power. That the challenged enactment exceeds Com'rs' lawful discretion is alleged on further grounds of statutory taxing limitation and on other statutory ground of excessive conduct that is not necessarily a tax matter. A challenge on such issues is non-political in nature. The question, as presented, is justiciable, for reasons explained in Pacific Telephone Co. v. Oregon, 223 U.S. 118 @150, but should additionally be found justiciable on the ground that subject conduct and tax violate Article IV, Section 4, United States Constitution, for which a citizen's right to petition for redress may not be impaired. While cause of action here does not solely arise out of injury to rights

under Article IV, Section 4, this case cannot be resolved absent recognition, tacitly or expressly, that sovereignty of law is an indispensable element of same republican guarantee. This Court could avail itself of this non-political opportunity to state that a guarantee of sovereignty of the law in legislative taxing acts of state government officials is one basic principle of the republican guarantee, for which, if violated, a citizen's right to petition for redress may not be impaired.

Sovereignty of law - the requirement that all government officials, highest to lowest, regardless of branch, must obey the law - has been recognized by this Court as essential to the form of republican government in this country. See Marbury v. Madison, 5 U.S. 137; U.S. v. Lee, 106 U.S. 196. A Modern court has been powerfully criticized for weakening the sovereignty doctrine in the case of the President. See

Justice White's dissent in Nixon v. Fitzgerald, 457 U.S. 731. Surely such immunity should not be extended to taxation by county commissioners. In return for their allegiance, all citizens of the United States may demand government in conformity with republican principles. Minor v. Happersett, 88 U.S. 162; U.S. v. Cruikshank, 92 U.S. 542. Also see generally Hamilton, "Federalist" No. 84; Madison, "Federalist" No. 44.

We were all taught from grade school that the right to be taxed in accordance with law is a fundamental constitutional guarantee. A republican government is one "which derives all its powers directly or indirectly from the great body of the people." Madison, "Federalist" No.39. Congressionally established boundaries for the form of republican government in Colorado demand a representative one where the will of the people is codified in laws passed by repre-

sentatives elected for that purpose, especially as to taxation. Through the enabling act to Colorado state government, Congress has removed any doubt whether the question raised here might be of a political nature, and therefore not justiciable for reasons in Pacific, above, where at Section 4 it is expressly stated that the constitution of the Colorado state government formed: "shall be republican in form, . . . and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence, . . ." A fundamental principle facially expressed in the Declaration of Independence is that of representative government. "Taxation without representation" is expressly deplored.

> "That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . .

For imposing taxes on us without our consent."

By Congressional Declaration, the principle of "no taxation without representation" - being taxed in accordance with the laws passed by legislators elected for that purpose, expressed in The Declaration of Independence, is an indispensable part of a republican form of government and therefore a fundamental private right protected under the guarantee clause of Article IV, Section 4, United States Constitution. The guarantee that state government will be limited and delegated can only logically be to the people. To argue that the guarantee is to government officials that their powers will be limited renders it meaningless.

The principle of sovereignty of law as to taxation is so basic to the republican form of government established in this country that this Court could find that unlawful legislative imposition of a general tax by

local state government is a grievance for which the people may petition the government for redress, unimpaired; that all state citizens may demand state government in conformity with republican principles, especially as to taxation. That the issue here is an act of a local subdivision of state government unlawfully imposing a general tax by infirm legislative act should, by itself, be enough to overturn dismissal.

II. EQUAL PROTECTION AND DUE PROCESS

In these circumstances of unlawful imposition of a general property tax by legislative act, either the requirement that administrative remedy for abatement and refund of property taxes at 39-1-113 and 39-10-114, C.R.S. (A&R) be first pursued, unconstitutionally impairs a citizen's right to petition the government for a redress of grievances, or same A&R statutes do not meet minimum Unites States Constitution Fifth and Fourteenth Amendment due process

standards of clear and certain remedy that is meaningful.

Dismissal of all claims for relief here, in all statuses, for failure to first pursue administrative remedy of A&R, remedy for seeking individual monetary relief for property taxpayer status, is contrary to the doctrine of separation of government powers and violates fundamental and private guarantees of the equal protection and due process clauses of the Fourteenth Amendment; Even for the status of property taxpayer, administrative A&R provides no remedy for non-monetary injuries, does not meet minimum federal due process standards of clear and certain remedy for direct monetary injury, and the monetary remedy provided is not necessarily meaningful. If the Court of Appeals did not err in failing to reach issues of the case (for lack of jurisdiction) in upholding district court application of state law of A&R, said state

law violates Ferris' constitutional rights to petition for redress, equal protection of the laws, and due process. Therefore, said law of A&R is unconstitutional on its face; or if the Court of Appeals did err, it was applied unconstitutionally in this case because a certain status, other than state citizenship, is required to seek redress - For issues here, non-property taxpayer citizens have no less a stake in lawful government than property taxpayers. A statute can be unconstitutional as written or as explained by the state courts. Giaccio v. Pennsylvania, 382 U.S. 399.

The Court of Appeals found that this challenge was of the nature for which A&R procedure was intended, and that circumstances here do not except Ferris from first exhausting administrative remedy of A&R, because the Com'rs might cure the defect by imposing a subsequent legal levy if the tax levy were determined illegal, by Com'rs, on ad-

ministrative review; that it was therefore unnecessary to address Ferris' other contentions of error (including claims for relief in statuses other than property taxpayer) because of disposition of "taxpayer's" claims on jurisdictional grounds.

By applying A&R statutes to these circumstances, the trial and appellate courts have bypassed the constitutional questions presented by this case. Using the A&R statutes in such a manner to dispose of Ferris' claims and constitutional questions effectively ratifies the excessive and infirm governmental conduct at issue, rendering nugatory, in these circumstances, Colorado statutory guarantees of property tax revenue increase limitation and public meetings/hearings. Dismissal on ground that Ferris' First Amendment right to petition the government for redress flows solely through A&R procedure, solely as "taxpayer," has the same effect, for purposes of

appeal, as if the constitutional questions were answered erroneously, but absent an articulated answer. Such so unnecessarily complicates the equal protection and due process aspects of this case that they cannot be reached without involving the First Amendment, the Guarantee Clause, and the doctrine of conflict of laws. A&R statutes ought not to be interpreted in such a way as to defeat the clear intent of declaratory judgment and openness-and-honesty-in-government statutes. The claims here are that the governmental conduct at issue violates both general statutory rights to public meetings/hearings and those specific to legislative exception procedures for property taxation, rights that are conferred on all the general public. e.g. C.R.S. 24-6-401; 29-9-101; 29-1-303. These express guarantees are not contingent on additional status of property taxpayer. Therefore redress cannot be limited to property taxpay-

ers, as the Court of Appeals opinion effects, without violating the Fourteenth Amendment Due Process Clause, nor can remedy to citizens with additional status of property taxpayer be impaired by existence of specific remedy of A&R for such status without violating the Fourteenth Amendment Equal Protection Clause. Equal access to the courts to question the constitutional validity of legislative acts and executive fiats is a fundamental constitutional right. See Bounds v. Smith, 430 U.S. 817; United States Constitution, First Amendment; Colorado Constitution, Article II, Section 6. This Court could find that unimpaired access is essential to upholding the doctrines of sovereignty of law and separation of powers that are indispensable to a republican form of government, especially where, as here, the conduct at issue violates express statutory rights conferred to all the general public. If A&R is abso-

lute prerequisite to judicial review, non-property taxpayers are denied remedy. If so, then A&R is unconstitutional because its existence limits standing in court to challenge illegal government behavior at issue solely to property taxpayers.

An administrative A&R proceeding, before Respondent Com'rs, is not an appropriate forum for redressing same Com'rs legislative acts, and therefore judicial review cannot be impaired by its existence. See generally McKart v. United States, 395 U.S. 185. Even if A&R were available to non-property taxpayers and provided all the relief sought here, which it does not, it is contrary to the doctrine of separation of powers for a board of county commissioners to be given the courts' review powers in an administrative proceeding where same board would judge the legality and validity of its own binding legislative acts. A&R was intended to remedy grievances to dis-

proportionate share of property tax burden because of excessive assessment. Board of Assessment Appeals v. Benbrook, 735 P.2d 860 (Colo.) @868. A&R affords no remedy to non-property taxpayers, as it is unavailable to that status. Regardless of its availability, no remedy is provided for violations of public meetings/hearings statutes - only direct and individual monetary relief to property taxpayers. On the other hand, if non-property taxpayers are accorded relief from illegal government behavior, as to statutory public meetings/hearings requisites at issue, by means of declaratory judgment, as was sought here, then to deprive Ferris of the same remedy and relief accorded to non-property taxpayers, for the sole reason that he has additional status as property taxpayer, deprives him of equal protection of the law. In view of affirmed dismissal, for failure to exhaust an administrative remedy available to only

one of several alleged statuses, a citizen could be precluded from any redress or remedy simply by labeling him in such a way as to preclude statutory remedies he might have available in another status, forcing him to choose one avenue of remedy to the exclusion of all others available and other relief they might afford. This court has already decided that forcing a citizen to surrender one right in order to assert another right is intolerable. Simmons v. U.S., 390 U.S. 389. Where relief is first sought has no bearing on whether the general tax is invalid. The question is, what are the meaningful legal remedies for an invalid general tax and the illegal governmental conduct that produced it? Since there is no express or implicit provision in A&R statutes to administratively "cure" the levy, the administrative framework provides no clear and certain remedy or "cure" as to the legislative acts and the general

tax. Com'rs' only lawful means to "cure" the levy overall is only theoretically possible only for future tax collection years beyond 1989 and only in the legislative arena, not the administrative, contingent on Com'rs' majority resolution to do so. Once legislative exception procedure to the property tax revenue increase limitation was elected, a resultant levy to collect approved revenues was mandatory for budget year 1989. 29-1-303(3), (6), C.R.S. A&R applies to one property taxpayer's direct economic injury only. Right to mandatory notice and opportunity to attend, hear, and participate in hearings is conferred to the general public at 29-1-303(1)(b),(5), C.R.S., not only to property taxpayers. A&R provides no relief to individual property taxpayers for injury of being excluded from attendance and participation by flawed mandatory notice - absent, they could not necessarily know the procedure was infirm,

nor how so - and certainly provides none to citizen/electors, not property taxpayers, who suffer other than direct economic injury and to whom A&R is unavailable. Indirect economic injury by effect of levy on local consumer costs and property resale value is real. Individual refund to Ferris/taxpayer would not remedy the latter or other injury. Constitutions' "penumbrally" guaranteed principle of "no taxation without representation" is impermissible of no remedy for Ferris' personages that pay the tax indirectly. The Court of Appeals recognized a private right to individual monetary relief, but overlooked the public rights to lawful taxation and open hearing/meetings, thereby allowing Com'rs the opportunity to collect the entire amount of the excess revenue, abate and refund no net amount [39-10-114(1)(a)(I)(B)], and levy derivative taxes, as Com'rs already have, with no requirement of any public cure.

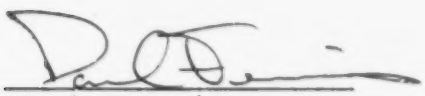
The Fourteenth Amendment Due Process Clause not only obligates the states to provide "clear and certain remedy" and "meaningful backward-looking relief to rectify any unconstitutional deprivation," but to insure that the remedy and relief are meaningful. McKesson v. Division of Alc. Bev. 495 U.S. ___. For the conduct at issue, remedy of A&R provides Ferris relief that is not clear and certain nor meaningful. A&R is a remedy for individual property taxes that have already been assessed. What remedy does A&R provide for future derivative levies if, as here, the excess revenue is made a prospective part of the county's revenue base? The future amount to be abated cannot be known, as such is contingent on future legislative setting of levies. For that circumstance, A&R is a remedy that must be pursued, annually and piecemeal, by individual property taxpayers seeking relief. Since there is no provi-

sion in A&R remedy to administratively cure the illegal tax overall, potential of a multiplicity of annual A&R proceedings does not meet "clear and certain" due process standards established in McKesson, above, nor is relief provided "meaningful."

"Truth in taxation" legislative exception procedure, whether or not successfully implemented, allows only two possible resultant levies: To collect a lawfully approved excess revenue amount; or to collect zero revenue increase. 29-1-303(3), (6), C.R.S. A&R statutes allow the total amount of revenue at issue to be collected, regardless of whether individual property taxpayers successfully petition. 39-10-114(1)(a)(I)-(B), C.R.S. The proportionate part of abated or refunded taxes, including their own, may be reassessed against successful petitioners. Thus it is constitutionally impermissible that same be sole remedy under minimum due process and meaningful relief

standards set in McKesson, above. Sole clear, certain and meaningful remedy and relief for "cure" of the injuries here is judicial review as sought.

Petitioner Paul Ferris requests this United States Supreme Court grant this petition, reverse dismissal, and enter findings for declaratory and injunctive relief sought on appeal, as to the validity of the excess tax levy at issue.



4/10/92

Paul Ferris
840 23 Road
Grand Junction, CO
81505
(303) 243-3115

Date

VERIFICATION

I, Paul Ferris, being of lawful age, and being first duly sworn upon oath, depose and state as follows:

I have drafted and read the foregoing "PETITION FOR A WRIT OF CERTIORARI," know the contents thereof, and pledge that the statements therein are true and correct to the best of my knowledge, information and belief.

DATED this 10th day of April 1992.

Paul Ferris

STATE OF COLORADO) ss.
COUNTY OF MESA)

The foregoing instrument was acknowledged before me this 10th day of April, 1992 by Paul Ferris.

Witness my hand and official seal.
My commission expires: 10-18-95

Betty Sparks
NOTARY PUBLIC

4-10-92
Date

91-1661

(2)

Supreme Court, U.S.
FILED
APR 10 1992
OFFICE OF THE CLERK

CASE NO.

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL FERRIS
PETITIONER

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; RICHARD C. POND IN HIS CAPACITY AS MEMBER OF SAID BOARD AND INDIVIDUALLY; MAXINE ALBERS AND R. W. HOLMES IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF SAID BOARD AND INDIVIDUALLY.
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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March 1992.

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COLORADO COURT OF APPEALS
No. 89CA2137

PAUL FERRIS,
Plaintiff-Petitioner
Appellant,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; Richard C. Pond, in his capacity as member of said Board and individually; Maxine Albers and R.W. Holmes in their respective capacities as members of said Board and individually,
Defendants-Respondents-Appellees.

Appeal from the District Court of Mesa County
No. 89CV204
Honorable David A. Bottger, Judge
JUDGMENT AFFIRMED
Dated: April 25th, 1991

DIVISION III
Opinion by JUDGE TURSI
Criswell and Plank, JJ., concur

Paul Ferris, Pro Se

Younge & Hockensmith, P.C.
Mark R. Luff
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Grand Junction, Colorado
Mesa County Attorney's Office
Maurice Lyle Dechant
Alan N. Hassler
Grand Junction, Colorado
Attorneys for Defendants-Respondents-Appellees

[1]Plaintiff, Paul Ferris (taxpayer), appeals the trial court's judgment dismissing

his complaint for declaratory and injunctive relief against defendants, the Board of County Commissioners of the County of Mesa, and the commissioners in their individual capacities (commissioners). We affirm.

The facts are not in dispute. In late 1988, the commissioners sought to raise property taxes by imposing a mill levy in excess of the property tax revenue increase limitation. See generally Sec. 29-1-301, C.R.S.(1986 Repl. Vol. 12A). In order to do so the commissioners were required to invoke and satisfy the "truth in taxation" procedure, which mandates adherence to certain notification and hearing requirements. See Colo. Sess. Laws 1987, chs. 226 and 227, Sec.29-1-303, at 1185, 1187.

At the conclusion of the "truth in taxation" procedure, the commissioners adopted a resolution approving imposition of a mill levy in excess of the statutory limitation.

Taxpayer then filed his complaint with the district court, seeking a judicial determination that the commissioners: (1) implemented the improper procedure to increase taxes, (2) failed to comply with the mandatory statutory notification and hearing procedures, and (3) violated Sec.24-6-401, C.R.S. (1988 Repl. Vol. 10A), the Open Meetings Law. He additionally sought an order enjoining the County from collecting and spending the tax revenues gained by the mill levy increase.

The commissioners moved to dismiss taxpayer's complaint,asserting that he had failed to exhaust his administrative remedies. The commissioners alternatively asserted that they had followed all proper statutory procedures.

[2]After conducting a hearing to consider taxpayer's motion for preliminary injunction, the trial court entered its oral findings and concluded that taxpayer had fail-

ed to exhaust the applicable administrative procedures and remedies. The court also found relative to the requested injunctive relief that taxpayer did not fulfill his burden of proving the likelihood of prevailing on the merits or demonstrating irreparable harm.

Accordingly, taxpayer's motion for injunctive relief was denied, and the trial court ordered that taxpayer was precluded from seeking judicial review. The complaint was dismissed, and a motion to reconsider was subsequently denied by written order.

I.

As a preliminary matter, the commissioners assert that our review is confined to the trial court's written order denying Ferris' motion for reconsideration because it constitutes the only final order entered for purposes of appeal. We disagree.

A trial court is not required to enter

written findings of fact and conclusions of law in support of decisions on motions to dismiss and motions for summary judgment. C.R.C.P. 52. Moreover, oral findings may be entered in the record in support of the trial court's judgment, Mowry v. Jackson, 140 Colo. 197, 343 P.2d 833 (1959), so long as we are able to determine the basis of the trial court's decision upon review. People v. [3]Abbot, 638 P.2d 781 (Colo. 1981); Ray v. City of Brush, 152 Colo. 428, 383 P.2d 478 (1963).

Here, the legal effect of the trial court's detailed oral findings and order disposed of the entire claim for relief. See Levine v. Empire Savings & Loan Ass'n, 192 Colo. 188, 557 P.2d 386 (1976); Wilbourn v. Hagan, 716 P.2d 485 (Colo. App. 1986). And, since final judgment was otherwise properly entered and certified, we may consider all of Ferris' contentions on appeal. See Wesson v. Bowling, 199 Colo.

30, 604 P.2d 23 (1979).

II.

Taxpayer contends that the trial court erred in dismissing his request for declaratory relief on the jurisdictional ground that he had failed to exhaust administrative remedies as a prerequisite to judicial review. We disagree.

A.

The thrust of taxpayer's dispute is that the commissioners imposed an excess mill levy in contravention of statutory procedural requirements. Taxpayer contends that because his challenge of wrongful governmental conduct is neither contemplated nor remedied by the statutory administrative framework, he is not required to exhaust inadequate administrative remedies as a prerequisite to invoking declaratory relief.

Sections 39-1-113 and 39-1-114, C.R.S., (1982 Repl. Vol. 16B) permit taxpayers to

abate or recoup taxed "that have been erroneously or illegally levied by action of the county [4]commissioners." Board of Assessment Appeals v. Benbrook, 735 P.2d 860 (Colo. 1987) (emphasis supplied).

Specifically, these administrative remedies provide that erroneously or illegally levied taxed shall be abated or refunded, "whether due to erroneous valuation for assessment, irregularity in levying, or clerical error." See Colo. Sess. Laws 1988, ch. 268, Sec. 39-10-114 at 1290 (emphasis supplied). An application and hearing process must be followed before a taxpayer is entitled to receive the remedial abatement or refund. See Colo. Sess. Laws 1988, ch. 268, Sec. 39-1-113 at 1290 & 1294.

Our supreme court has held that the abatement and refund provisions apply when a taxpayer seeks to obtain relief:

"from an error in assessment or an

> erroneous or illegal imposition of property taxes...[T]he scheme is designed to accommodate a variety of types of challenges, provided that the complaining taxpayer gives the county and state officials, who are responsible for insuring adequate revenue to operate our government, notice of the alleged erroneous assessment or illegal tax and an opportunity to respond within the administrative framework."

Board of Assessment Appeals v. Benbrook, supra; see W. Ela, Some Aspects of Colorado Taxpayers' Remedies, 23 Rocky Mtn. L. Rev. 145 at 153-154 (1950).

Nevertheless, taxpayer urges us to limit the remedial application of the refund and abatement statutes to situations in which taxpayers contest illegal or erroneous assessments and to exclude cases involving

the illegal or erroneous imposition of tax levies as a result of excessive governmental conduct. Inasmuch as such a construction would render the statutory **[5]** language meaningless, we decline to do so. See Thiret v. Kautzky, 792 P.2d 801 (Colo.1990).

Our examination of the pertinent statutes establishes that county commissioners must adhere to a mandatory procedure in order to levy excess property taxes. See Citizens' Committee for Fair Property Taxation v. Warner, 127 Colo. 121, 254 P.2d 1005 (1953). Violation of the procedure constitutes an "irregularity in levying." See Stegon v. Pueblo West Metropolitan District, 198 Colo. 128, 586 P.2d 1206 (1979). Therefore, assuming the commissioners acted in derogation of the pertinent statutory guidelines by imposing taxes without adhering to the attendant procedural protections, we conclude that the tax is an illegal levy to which the refund and abate-

ment statutes apply. See Bea Kay Real Estate Corp. v. Aragon, 782 P.2d 837 (Colo. App. 1989); American Airlines v. State Board of Equalization, 749 P.2d 986 (Colo. App. 1987), rev'd on other grounds, 773 P.2d 1033 (Colo. 1989).

The refund and abatement administrative provisions afford complete and adequate remedies, Lamm v. Barber, 192 Colo. 511, 565 P.2d 538 (1977), which taxpayers must exhaust before commencing suit. Hoffman v. Colorado State Board of Assessment Appeals, 683 p.2d 783 Colo. 1984); Southern Cafeteria, Inc. v. Property tax Administrator, 677 P.2d 362 (Colo.App. 1983). And, because a taxpayer's failure to exhaust administrative remedies may not be circumvented by a declaratory judgment action, Davison v. Board of County Commissioners, 41 Colo. App. 344, 585 P.2d 315 **[6]** (1978), thus, generally a trial court is divested of subject matter jurisdiction. Leete v. Colora-

do Board of Medical Examiners, ____ P.2d __ (Colo. App. No. 89CA1906, February 14, 1991):

B.

We also disagree that the present circumstances except taxpayer from having to exhaust his administrative remedies before proceeding with judicial review.

Citing Hamilton v. Denver, 176 Colo. 6, 490 P.2d 1289 (1971), taxpayer argues that these circumstances favor judicial review because our resolution of legal questions regarding the legality of the tax levy will prevent a multiplicity of actions.

However, we have previously held that taxpayers may not justifiably avoid exhausting administrative remedies in similar circumstances. Davison v. Board of County Commissioners, supra.

Moreover in the event the tax levy is determined to be illegal upon administrative review, the board of county commissio-

ners may cure the defect by imposing a subsequent legal levy. See Colorado & Southern Ry. Co. v. Board of Commissioners, 70 Colo. 8, 196 P. 331 (1921) ("If the board can cure... the making of a totally invalid levy, by making a levy afterwards, it can remedy any defect which may have made a former levy partially invalid.").

Consequently, under circumstances in which a multiplicity of actions may be prevented without intervention of judicial review, taxpayer may not be granted relief from exhausting his [7]administrative remedies.

III.

Taxpayer next contends that the trial court erroneously denied his motion for a preliminary injunction. We disagree.

A preliminary injunction provides an extraordinary remedy which must be conditioned upon the movant's threshold showing of several criteria, including the lack of a

plain, speedy, and adequate remedy at law for the alleged injury. C.R.C.P. 65 (a); Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982). Failure of a movant to establish this precondition is fatal to injunctive relief since "[e]quity will not intervene where a plaintiff has a plain and adequate remedy at law." American Investors Life Insurance Co. v. Green Shield Plan, Inc., 145 Colo. 188, 358 P.2d 473 (1960).

Therefore, the trial court properly denied taxpayer's motion for a preliminary injunction, if only on the basis that taxpayer had failed to exhaust his adequate administrative remedies at law. See Lamm v Barber, supra. In light of the foregoing, taxpayer's contention that he possesses standing to pursue injunctive relief is academic, and the trial court's discretionary order is binding upon review. See Macleod v. Miller, 44 Colo. App. 313, 612 P.2d 1158 (1980).

IV.

Because of our disposition of taxpayer's claim on jurisdiction grounds, it is unnecessary for us to address taxpayer's other contentions of error.

[8] Taxpayer's motion for sanctions pursuant to C.A.R. 38 is without merit.

Judgment affirmed.

JUDGE CRISWELL and JUDGE PLANK concur.

==========

DISTRICT COURT, MESA COUNTY, COLORADO
Civil Action No. 89CV204

REPORTER'S TRANSCRIPT ON APPEAL

PAUL FERRIS,

Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; Richard C. Pond in his capacity as member of said board and individually; Maxine Albers and R. W. Holmes in their respective capacities as members of said board and individually,

Defendants.

On Wednesday, November 8, 1989, this matter came on for hearing on plaintiff's motion for Preliminary Injunction before the Honorable DAVID A. BOTTGER, District judge.

APPEARANCES:

Plaintiff Ferris appeared in person and without counsel.

For the Defendants: Maurice Lyle Dechant, No.8948 and Earl Rhodes, No.6723.

[Record Volume III, p.109 @line 3.]

. . . I make the following findings, conclusions, and order. First of all, on the plaintiff's request for the entry of a preliminary injunction, I find the Court has jurisdiction over the parties and the subject matter. It is the plaintiff's burden of proof to establish, at a minimum, that he is likely to prevail on the merits and that if a preliminary injunction does not enter he would be irreparably harmed. I find today that the plaintiff has failed to sustain either of those burdens.

The plaintiff's contention is that the tax was levied illegally in violation of, principally, section 29-1-301, paragraph (1.2), as it applied at the time of this levy and, additionally, that it violated section 24-6-401, colloquially known as the Sunshine Act. The Court finds that the

former statute is inapplicable. In fact, the applicable statute is section 29-1-303, which applies in a situation such as this one, where a levy is sought not only for capital expenditures, but also operating expenses. I find that Plaintiff has failed to show that this statute was not observed, and in fact the evidence is that it was.

I further find that the Sunshine Act is inapplicable. The case of Bagby v. School District, cited in the **[110]**brief, makes that clear. The case of Allen v. County Commissioners, makes clear that the applicable statute is section 29-9-101, and I find that based upon the evidence that this statute was observed. That statute in part provides that meetings, well, in this case, the county commissioners shall not make final policy decisions nor shall any resolution, and so forth, be approved or adopted at any closed session. The evidence is that the resolution which the pla-

intiff attacks was adopted at an open session, a public session, for which proper notice was provided. The idea that somehow the commissioners could not, because of the illness of Commissioner Albers' husband, continue the hearing from the 22nd to 25th of November is inconsistent with the letter and the spirit of the statute in question. They provided proper notice of the 22nd hearing, November 22nd, and in fact it's my opinion they didn't need to give anybody notice that the hearing was being continued at all. They went beyond the statutory requirement and gave as much notice as they could that the hearing was being continued to November 25, 1988, and exceeded the statutory requirements. Plaintiff's suggestion to the contrary notwithstanding. a tax is not rendered illegal because he thinks there was insufficient justification for its adoption nor because he apparently thinks the money has been misapplied or not

applied consistent with the notice. In fact, the notice was for **[111]** contemplation of a six mill increase. The commissioners adopted a four mill increase. It would be difficult to imagine how any member of the public is prejudiced by the adoption of a mill levy less than what the notice warned.

There is available to the plaintiff administrative procedures for an issue like this, which he has apparently -- not apparently -- which he has not taken advantage of. These are contained in section 39-1-113 and 39-10-114, Colorado Revised Statutes. By virtue of those administrative procedures alone, he has failed to demonstrate that even if this tax is illegal that he will suffer any irreparable harm because he has these administrative avenues available. Also, the fact that he has a three-year redemption period within which time he can obtain the property if taxes weren't paid in this case -- in fact they

were -- if this tax were ultimately determined to be illegal, which, though a probability, it will not be, Mr. Ferris has available to him a simple remedy, and that is money damages from the county. He failed to show that they are inadequate or that relief cannot be obtained within the three-year redemption period.

So, for all those reasons, the request for preliminary injunction is denied based upon the case of Davison v. County Commissioners, which is 41 Colo. App. 344, a 1978 case, which bears some striking resemblance to this case. The court held that exhaustion of administrative **[112]**remedies was a condition precedent to obtaining an action to set aside tax assessments. This was couched as a declaratory judgment action, as is this one. The court found that the administrative procedures I cited were adequate, they specifically permit review if taxes have been levied reasonably or il-

legally. The plaintiff's contention that there is no administrative remedy or review for that is simply contrary to the plain language of the statute in this case. The court described these remedies as complete and adequate and said prior to commencing a suit to the illegal taxation issues the taxpayers were required to exhaust the administrative remedies detailed in those sections and went on to hold that bringing this as a declaratory judgment action would not circumvent that requirement, nor as a class action. Even if this case were a class action, which it is not, that would not excuse the plaintiff from exhausting his administrative remedies as well.

So, I am denying the request for preliminary injunction on its merits, and at this point granting Defendants' motion for judgment on the pleadings. This case is ordered dismissed. Mr. Ferris, you have the right to appeal this decision. You have 45

days from **today** to file notice of appeal, and I have a four-thirty matter that has been delayed 20 minutes, so this matter is in recess.

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DISTRICT COURT, MESA COUNTY COLORADO
Case No. 89 CV 204, Division I

ORDER

PAUL FERRIS,
plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS, et al.,
Defendants.

Dated: November 14, 1989

This case comes before me on Plaintiff's oral motion, made at the conclusion of the preliminary injunction hearing on November 8, 1989, to reconsider my granting of Defendants' Alternative Motion for Judgment on the Pleadings and/or Summary Judgment. After reviewing relevant pleadings and authorities, I deem further argument unnecessary and enter this Order.

Plaintiff's Amended Complaint does not

allege that he has exhausted his administrative remedies before bringing this action. Despite my invitation at the beginning of the November 8, 1989 hearing, Plaintiff has presented no evidence, either by affidavit or testimony, that he has exhausted his administrative remedies. Rather, Plaintiff argues that this requirement is inapplicable.

The cases cited by Plaintiff do not support this position. The taxation cases cited by Plaintiff suggest that under certain circumstances injunctive relief may be available, but they do not excuse an aggrieved taxpayer from exhausting his administrative remedies. In Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961), the Colorado Supreme Court held that a property owner may challenge the constitutionality of a zoning ordinance without exhausting administrative remedies. Aside from the deference given by courts to

taxation statutes and ordinances, as pointed out by Defendants' authorities, this holding is inapplicable here because Plaintiff does not challenge the constitutionality of the subject ordinance by merely the procedures by which it was adopted.

In contrast, Colorado courts have repeatedly held that exhaustion of administrative remedies is a prerequisite to an action such as this one. Hoffman v. Colorado State Board of Assessment Appeals, 683 P.2d 783 (Colo. 1984); Southern Cafeteria, Inc. v. Property Tax Administrator, 677 P.2d 362, 364 (Colo. App. 1983); Davison v. County Commissioners, 41 Colo. App. 344, 347, 585 P.2d 315 (1978). In Lamm v. Barber, 192 Colo. 511, 565 P.2d 538 (1977), the Colorado Supreme Court endorsed the administrative remedies which Sections 39-1-113 and 39-10-114, 16B C.R.S., provide to Plaintiff here. As a matter of law, these statutes afford Plaintiff a plain, speedy and

adequate legal remedy, the absence of which is a prerequisite to injunctive relief.

For these reasons, Defendants' Alternative Motion for Judgment on the Pleadings and/or Summary Judgment is granted and Plaintiff's oral motion for reconsideration is denied. IT IS ORDERED that judgment enter in favor of defendants and against Plaintiff dismissing this action with prejudice.

BY THE COURT:

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David A. Bottger Date

District Court Judge

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DISTRICT COURT, MESA COUNTY COLORADO
Case No. 89 CV 204, Division I

ORDER

PAUL FERRIS,
plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO;, et al.,
Defendants.

Dated: December 8, 1989

This case comes before me on Plaintiff's

Objection and Petition for Redress with Affidavit and Plaintiff's Motion for C.R.C.P. Rule 11 Sanctions. After reviewing these motions, relevant pleadings and authorities, I deem further oral argument unnecessary and enter this Order.

Plaintiff's Objection and Petition for Redress with Affidavit indicates that Plaintiff misconstrues the Court's Order of November 14, 1989. In that Order the Court granted Defendants' Alternative Motion for Judgment on the Pleadings and/or Summary Judgment on the grounds that the Plaintiff had failed to allege or present any evidence that he had exhausted his administrative remedies before bringing this action. The deficiency in Plaintiff's Amended Complaint cannot be remedied by discovery or an evidentiary hearing, as Plaintiff requests.

At the beginning of the November 8, 1989, preliminary injunction hearing, the court

advised Plaintiff that it desired evidence on the exhaustion issue. Plaintiff neither objected nor presented any evidence that he had exhausted his administrative remedies, but merely reiterated his belief that this requirement did not apply to him. Plaintiff has had ample opportunity to present evidence on this issue but has failed to do so. In addition, he has not made the showing required by Rule 56(f), C.R.C.P., to postpone ruling on Defendant's motion.

The Court fully considered Plaintiff's Response in Opposition to Defendant's Alternative Motion for Judgment on the Pleadings and/or Summary Judgment before entering its Order of November 14, 1989. Thus, Plaintiff has not shown that he was prejudiced by the court's alleged failure to provide him an appropriate time to respond.

Plaintiff's Motion for C.R.C.P. Rule 11 Sanctions does not establish that Defendants or their counsel have violated Rule

11. The mere fact that the evidence at the November 8, 1989 hearing did not support one of the allegations in Defendants' pleadings does not establish a violation of Rule 11. If it did, virtually every non-prevailing party would be subject to Rule 11 sanctions.

For these reasons, Plaintiff's Objection and Petition for Redress with Affidavit and Plaintiff's Motion for C.R.C.P. Rule 11 Sanctions ar denied.

BY THE COURT:

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David A. Bottger Date

District Court Judge

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THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 89CA2137

ORDER

PAUL FERRIS V THE BD. OF COUNTY COMM. ET AL

Upon consideration of the petition for rehearing filed by the Appellant herein, said petition is hereby DENIED. It is ordered that issuance of the Mandate hereby

be, and the same hereby is, stayed to and including June 24, 1991, provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Tursi, J.

Criswell, J.

Plank, J.

Dated: May 23, 1991

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SUPREME COURT, STATE OF COLORADO
Case No. 91SC370
Certiorari to the Colorado Court of Appeals
89CA2137
Mesa County District Court 89CV204

ORDER OF THE COURT

PAUL FERRIS,
Petitioner,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; Richard C. Pond in his capacity as a member of said board and individually; Maxine Albers and R.W. Holmes in their respective capacities as members of said board and individually,
Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 12, 1991.

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SUPREME COURT, STATE OF COLORADO
Case No. 91SC370
Certiorari to the Colorado Court of Appeals
89CA2137

ORDER OF THE COURT

PAUL FERRIS,
Petitioner,
v.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; Richard C. Pond in his capacity as a member of said board and individually; Maxine Albers and R.W. Holmes in their respective capacities as members of said board and individually,
Respondents.

Upon consideration of the Petition to Reconsider, Grant, and Hear filed in the above cause, and now being sufficiently

advised in the premises,

IT IS THIS DAY ORDERED that said petition shall be, and same hereby is, STRICKEN. C.A.R. 54(b).

BY THE COURT, NOVEMBER 26, 1991.

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United States Constitution:

Article IV, Section 4: The United States shall guarantee to every State in this Union a Republican Form of government, . .

Amendment I: . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment V: . . . nor shall any person . . . be deprived of life, liberty, or property without due process of law; . . .

Amendment XIV, Section 1: . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process o

law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Colorado Constitution:

Article II, Section 6: Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and right and justice should be administered without sale, denial or delay.

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Federal Enabling Act to Colorado State Government, Section 4. . . the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, . . . and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence; . . .

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24-6-401. Declaration of policy. It is declared to be the policy of this state that the formation of public policy is public business and may not be conducted in secret.

24-6-402. Meetings - open to public. (1) All meetings of two or more members of any board, committee, commission, or other policy-making or rule-making body of any state agency or authority or of the general assembly, including all meetings of two or more members of the regents of the university of Colorado or any other governing board of a state institution of higher education referred to by the provisions of section 5 of article VIII of the state constitution or otherwise established by law, at which any public business is discussed or at which any formal action may be taken by such board, committee, commission, or other policy-making or rule-making body are declared to be public meetings open to the

public at all times, except as may be otherwise provided in the state constitution.

(2) Any meetings at which the adoption of any proposed policy, position, resolution, rule, regulation, or formal action occurs or at which a majority or quorum of the body is in attendance, or is expected to be in attendance, shall be held only after full and timely notice to the public.

(2.1) This part 4 does not apply to any chance meeting or social gathering at which discussion of public business is not the central purpose.

(2.3) The members of a public body subject to this part 4 upon the affirmative vote of two-thirds of the entire membership of the body, may hold an executive session only at a regular or special meeting and for the sole purpose of considering any of the matters enumerated in subsection (2.5) of this section or the following matters:

(a) The purchase of property for public

purposes, or the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of the public body shall use this paragraph (a) as a subterfuge for providing covert information to prospective buyers or sellers. Governing boards of state institutions of higher education including the regents of the university of Colorado may also consider the acquisition of property as gift in an executive session, only if such executive session is requested by the donor.

(b) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action. Governing boards of institutions of higher education including the regents of the univer-

sity of Colorado may also confer with an attorney concerning specific claims or grievances or for purposes of receiving legal advice on specific legal questions. Mere presence or participation of an attorney at an executive session of a governing board of an institution of higher education including the regents of the university of Colorado is not sufficient to satisfy the requirements of this subsection (2.3).

(c) Matters required to be kept confidential by federal law or rules or state statutes;

(d) Specialized details of security arrangements where disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law;

(e) Determining positions relative to matters that may be subject to negotiations with employees or employee organizations;

developing strategy for and receiving reports on the progress of negotiation; and instructing negotiators;

(f) With respect to the board of regents of the university of Colorado, matters concerning the modification, initiation, or cessation of patient care programs at the university of Colorado hospital (including the university of Colorado psychiatric hospital), and receiving reports with regard to any of the above, if premature disclosure of information would give an unfair competitive or bargaining advantage to any person or entity.

(2.5) All meetings held by members of a public body subject to this part 4 to consider the appointment or employment of a public official or employee or the dismissal, discipline, promotion, demotion, or compensation of, or the investigation of charges or complaints against, a public official or employee shall be open to the

public unless said applicant, official, or employee requests an executive session. Governing boards of institutions of higher education including the regents of the university of Colorado may, upon their own affirmative vote, hold executive sessions to consider the matters listed in this subsection (2.5). Executive sessions may be held to review administrative actions regarding investigation of charges or complaints and attendant investigative reports against students where public disclosure could adversely affect the person or persons involved, unless the students have specifically consented to or requested the disclosure of such matters. An executive session may be held only at a regular or special meeting of the public body and only upon the affirmative vote of two-thirds of the entire membership of the body.

(2.6) Notwithstanding the provisions of subsections (2.3) and (2.5) of this sect-

ion, the state board of parole created in part 2 of article 2 of title 17, C.R.S., may proceed in executive session to consider matters connected with any parole proceedings under the jurisdiction of said board; except that no final parole decisions shall be made by said board while in executive session. Such executive session may be held only at a regular or special meeting of the state board of parole and only upon the affirmative vote of two-thirds of the membership of the board present at such meeting.

(2.7) Prior to the time the members of the public body convene in executive session, the chairman of the body shall announce the general topic of the executive session as enumerated in subsections (2.3) and (2.5) of this section.

(2.9) The limitations imposed by subsections (2.3), (2.5), and (2.7) of this section do not apply to matters which are co-

vered by section 14 of article V of the state constitution.

(3) The secretary or clerk of each board, committee, commission, or other policy-making or rule-making body shall maintain a list of persons who request notification of all meetings or of meetings when certain specified policies will be discussed and shall provide reasonable advance notification of such meetings.

(4) No resolution, rule, regulation, ordinance, or formal action of a board, committee, commission, or other policy-making or rule-making body shall be valid unless taken or made at a meeting that meets the requirements of subsections (1) and (2) of this section.

(5) The minutes of a meeting of any such board, committee, commission, or other policy-making or rule-making body shall be promptly recorded, and such records shall be open to public inspection. The minutes

of executive sessions authorized under subsections (2.3) and (2.5) of this section need only reflect the general subject matter of discussions.

(6) The courts of record of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

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PART 3 OF ARTICLE 1, TITLE 29, C.R.S.

29-1-301. Levies reduced - limitation.

(1) Effective January 1, 1988, all statutory tax levies for collection in 1989 and thereafter when applied to the total valuation for assessment of the state, each of the counties, cities, and towns not chartered as home rule except as provided in this subsection (1), and each of the fire, sanitation, irrigation, drainage, conservancy, and other special districts established by law shall be so reduced as

to prohibit the levying of a greater amount of revenue than was levied in the preceding year plus five and one-half percent, except to provide for the payment of bonds and interest thereon, for the payment of any contractual obligation which has been approved by a majority of the qualified electors of the taxing entity or for the payment of capital expenditures as provided in subsection (1.2) of this section. In computing the limit, the following shall be excluded: The increased valuation for assessment attributable to annexation or inclusion of additional land, the improvements thereon, and personal property connected therewith within the taxing entity for the preceding year; the increased valuation for assessment attributable to new construction and personal property connected therewith within the taxing entity for the preceding year; the increased valuation for assessment attributable to in-

creased volume of production for the preceding year by a producing mine if said mine is wholly or partially within the taxing entity and if said increase in volume of production causes an increase in the level of services provided by the taxing entity; and increased valuation for assessment attributable to previously legally exempt federal property which becomes taxable if such property causes an increase in the level of services provided by the taxing entity.

(1.2) (a) The limitation provided for in subsection (1) of this section shall not apply for the purpose of raising revenue to pay for capital expenditures. Such revenue shall not be included in determining the limitation in following years. For the purposes of this paragraph (a) "capital expenditure" means an expenditure made by a taxing entity for long-term additions or betterments, which expenditure, under gene-

rally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance. This paragraph (a) shall apply to counties, cities, and towns.

(b) If a county imposes an increased mill levy pursuant to paragraph (a) of this subsection (1.2) for a one-time, nonrecurring expenditure for a county road or bridge capital project or county road or bridge capital asset, the county may also request that the division of local government waive application of the provisions of section 43-2-202 (2), C.R.S., to the revenue received from that increased levy. In that event, said division shall notify the governing body of each municipality in the county of the request and of the period of time, not less than twenty days, during which the division will receive comment on the request. In considering whether to waive application of said section 43-2-202

(2), the division shall consider, among other relevant matters, the benefit of the project or asset to the municipalities in the county, the need for the project or asset, and alternative methods of and timing for financing the project or asset. No approval for such waiver shall be granted or continued until the division determines that the property tax revenues in the road and bridge fund, excluding the revenues from such increased levy, for the year for which the increase is imposed bear at least the same proportion to all countywide property tax revenues as in the immediate prior year budget.

(c) Any decision to exceed the limitation for the purpose of raising revenue for capital expenditures pursuant to this subsection (1.2) shall conform with the advertising and public hearing requirements of this paragraph (c). No taxing entity may exceed the limitation to raise such

revenue unless the governing board of such taxing entity has advertised its intention to do so and unless such excess has been approved by at least two-thirds of the members of such governing board voting at a public hearing. The advertisement specified in this paragraph (c) shall be in a newspaper published within the taxing entity, and, it there is no newspaper published within the taxing entity, then by publication in a newspaper published within the county which has general circulation within the taxing entity and shall appear twice therein. The second such appearance shall not be more than eight days prior to the date upon which the public hearing is to be held. The advertisement shall be no less than one-quarter page in size and shall have a caption in capital letters in a type no smaller than twenty-four-point stating "a public hearing shall be held to consider increasing your property taxes for

capital expenditures". Such advertisement shall be in a type no smaller than eighteen-point and shall not be placed in that portion of the newspaper in which legal notices and classified advertisements appear. Such advertisement shall state that such board will hold a public hearing, at a time and place fixed in the advertisement, and the purpose of such hearing and shall apprise the general public of its right to attend the hearing and make comments regarding the proposed matter. Such advertisement shall also state what the property taxes would be without such excess and what the property taxes will be with such excess and the percentage difference between such property taxes. Any public hearing held pursuant to this paragraph (c) shall be open to the general public. An opportunity shall be provided for all persons to present oral testimony within such reasonable time limits as shall be set by

the board conducting the hearing. Prior to the conclusion of the public hearing, the governing board of the taxing entity shall publicly announce the percent by which the mill levy required to raise such excess exceeds the mill levy computed without such excess.

(1.3) (a) Effective January 1, 1988, if a taxing entity which is enumerated in subsection (1) of this section does not impose in 1987 or any given year thereafter the maximum levy that it could impose under such subsection (1), or under section 29-1-301.1 (1) with respect to levies imposed in 1987 for collection in 1988, the taxing entity may impose, in the year immediately following, a levy sufficient to levy the amount of revenue which could have been levied in the year in which it did not impose the maximum levy plus five and one-half percent. If, for two or more consecutive years subsequent to December 31, 1986,

a taxing entity does not impose the maximum levy that it could impose under subsection (1) of this section, or under section 29-1-301.1 (1) with respect to levies imposed in 1987 for collection in 1988, the taxing entity may impose in any year a levy sufficient to levy the amount of revenue which was raised in the most recent year in which the maximum levy was imposed plus five and one-half percent for each intervening year, so that the application of said percentage will be cumulative and the result will be as if the taxing entity had levied the full amount it could have levied under subsection (1) of this section, or under section 29-1-301.1 (1) with respect to levies imposed in 1987 for collection in 1988, for each intervening year. Nothing in this paragraph (a) shall allow the cumulation of allowable percentage increases for levies imposed prior to 1987 for collection in 1988, or for levies imposed prior to 1991

for collection in 1992.

(b) Beginning January 1, 1990, the division of local government shall submit an annual report to the general assembly on the use of the cumulation allowed under paragraph (a) of this subsection(1.3) and the impact of such cumulation on taxpayers.

(c) This subsection (1.3) is repealed, effective June 30, 1991.

(1.5) All property tax revenues, except such revenues as are exempted in subsection (1) of this section, raised from any property tax levied by a taxing entity which is subject to this section, shall be combined for the purpose of determining the total amount of property tax revenue which the taxing entity is allowed to raise subject to the limitation imposed by this section. The limitation shall be applied to such aggregate property tax revenues. However, such aggregate amount shall not include any property tax revenue which is

raised by or on behalf of a district, authority, or area which is within but is not composed of the entire taxing entity and which is raised by a tax upon only property within such district, authority, or area; such property tax revenue is subject to a limitation independent of the limitation which is applied to the taxing entity within which such district, authority, or area is located. No statute establishing a set mill levy or establishing a maximum mill levy or authorizing an additional mill levy for a special purpose shall be construed as authorizing the taxing entity to exceed the limitation imposed by this section.

(1.7) For property tax years commencing on or after January 1, 1988, any taxing entity which is subject to the provisions of this section shall not levy any property tax for purposes which are exempt from the limitation imposed by subsection (1) of this section in an amount which is greater

than the amount of revenues required to be raised for such purposes during any year as specified by the provisions of any contract entered into by such taxing entity or any schedule of payments established for the payment of any obligation incurred by such taxing entity. Where bonds, contractual obligations, or capital expenditures have been approved, but actual revenues required for such purposes are not known at the time the levy is set, the taxing entity may base its levy on the estimated revenues which are so required for one year only and in subsequent years the levy shall be based on the actual revenues which are so required. Nothing in this subsection (1.7) shall preclude refunding of any obligation or contract.

(2) If an increase over said limitation is allowed by the division of local government in the department of local affairs or voted by the electors of a taxing entity

under the provisions of section 29-1-302, the increased revenue resulting therefrom shall be included in determining the limitation in the following year. However, any portion of such increased revenue which is allowed as a capital expenditure pursuant to section 29-1-302 (1.5) shall not be included in determining the limitation in the following year.

(3) The limitations of this part 3 shall apply to home rule counties unless provisions are included in the county home rule charter which are, as determined by the division of local government, equal to or more restrictive than the provisions of this part 3.

(4) In the event of a consolidation or merger, in whole or in part, of two or more political subdivisions or taxing entities, the surviving entity or the entity assuming service responsibilities shall use a direct proportion of the combined entities' prior

year property tax revenues as the base for computing the limitation in the year first succeeding such consolation or merger.

(5) (a) Notwithstanding any law to the contrary, in addition to any property tax which is levied in compliance with the limitation imposed by subsection (1) of this section, any county may levy an additional amount of property tax in 1988 for collection in 1989 and in 1989 for collection in 1990 which is equal to one-fourth of the one percent of the total amount of property tax which may be levied by such county in each said year as specified in subsection (1) of this section. Such additional tax shall not be subject to the limitation imposed by subsection (1) of this section. Any property tax levied pursuant to the provisions of this paragraph (a) shall be included in the total amount of revenue levied in said year for purposes of computing the limit for the succeeding year pur-

suant to the provisions of subsection (1) of this section.

(b) Such additional tax levied pursuant to the provisions of paragraph (a) of this subsection (5) shall be used by such county in the 1989 and 1990 budget years for the operation and improvement of the office of the assessor of such county, including, by not limited to, general operating expenses, additional staff, and acquisition of additional and improved equipment and technology.

(c) This subsection (5) is repealed, January 1, 1991.

(6) Where a taxing entity exceeds the limitation imposed by subsection (1) of this section during any year, the division of local government shall order a reduction in the authorized revenue of the taxing entity for the subsequent year in an amount which offsets the excess revenues levied in the preceding year. Such order shall be

preceded by notice to the taxing entity of the proposed order and an opportunity for the taxing entity to respond prior to issuance of the order.

29-1-302. Increased levy - submitted to people at election. (1) If the board of any special district authorized to levy a tax or any officer charged with the duty of levying a tax in any special district is of the opinion that the amount of tax limited by section 29-1-301 will be insufficient for the needs of such special district for the current year, the question of an increased levy may be submitted to the division of local government in the department of local affairs, and it is the duty of said division to consider the public awareness of the question, the public support therefor, and the public objection thereto and to examine the needs of such special district and ascertain from such examination the financial condition thereof, and, if in

the opinion of the division such special district is in need of additional funds, the said division may grant an increased levy for such special district is in need of additional funds, the said division may grant an increased levy for such special district above the limits specified in this part 3, and such special district is authorized to make such excess levy. The division of local government shall not under any circumstance grant an increased levy based upon increased valuation for assessment purposes from reappraisals. As used in this section, "special district" means any district organized pursuant to law, except school districts operating pursuant to title 22, C.R.S., which is authorized to levy and ad valorem tax on property within its boundaries, and the term includes, but is not limited to, districts organized under article 20 of title 30, C.R.S., articles 25 and 35 of title 31, C.R.S., and

titles 32 and 37, C.R.S.

(1.5) (a) The general assembly recognizes the need for periodic increased levies in order to finance capital projects and purchases of capital assets which are a one-time, nonrecurring expenditure. It is the intent of the general assembly that the division of local government may grant an increased levy for such expenditures if, in its opinion, a special district, to which section 29-1-301 (1.2) (a) does not apply, is in need of additional funds for such expenditures. Any increased levy granted by the division of local government in a given year which is designated by it as a capital expenditure shall not be included in determining the limitation in the following year. If the division is of the opinion that such additional funds will be needed for two or more years after reviewing the long-range plan of the special district concerning the expenditure of such

funds, it may grant an increased levy, and such increased levy shall automatically be allowed for each year during which such additional funds will be needed. During such years, the increased levy for each year shall not be included in determining the limitation in the following year.

(2) (a) In case the division of local government, after consideration of the public awareness of the question, the public support therefor, and the public objection thereto, refuses or fails within ten days after submission to it of an adopted budget to grant an increased levy to a special district pursuant to subsection (1) or (1.5) of this section, the question may be submitted to the qualified electors of said district at a general or special election called for the purpose and in the manner provided by law for calling special elections in such special district.

(3) Due notice of submission of the que-

stion of whether to grant the increased levy shall be given by the appropriate official designated by law starting at least thirty days in advance of the date set for the general or special election by publication in a newspaper published within the taxing entity, and, if there is no newspaper published within the taxing entity, then by publication in a newspaper published within the county which has general circulation within the taxing entity. The notice required by this subsection (3) shall appear at least three times in such newspaper, shall not be less than ten column inches in size, and shall be placed once in that portion of the newspaper in which legal notices and classified advertisements appear and twice in that portion of the newspaper in which legal notices and classified advertisements do not appear but shall otherwise be subject to the rates established in section 24-70-107, C.R.S.

If a majority of the votes cast at any such election is in favor of the increased levy as named in said election notice, then the officers charged with levying taxes may make such increased levy for the year voted upon.

29-1-303. Revenue-raising limitation exemption - public disclosure of tax levy.

(1) (a) Any county, city and county, city, or town, referred to in this section as a "taxing entity", which for any budget year adopts the procedure set forth in this section for public disclosure of the property tax levy to be imposed and which prior to the adoption of such procedure has complied with the provisions set forth in paragraph (b) of this subsection (1) shall be exempt from the limitation imposed under the provisions of section 29-1-301 for such budget year. The governing board of such taxing entity shall adopt such procedure by resolution within a reasonable amount of

time to permit the county assessor to perform the duties set forth in paragraph (b) of subsection (2) of this section. The governing board shall notify the division of local government of the adoption of such resolution.

(b) No taxing entity may adopt the procedure set forth in this section for public disclosure of the property tax levy to be imposed unless the governing board of such taxing entity has advertised its intention to adopt such procedure and unless the adoption of such procedure has been approved by at least two-thirds of the members of such governing board voting at a public hearing. The advertisement specified in this paragraph (b) shall be in a newspaper published within the taxing entity, and, if there is no newspaper published within the taxing entity, then by publication in a newspaper published within the county which has general circulation within the taxing

entity and shall appear twice therein. The second such appearance shall not be more than eight day prior to the date upon which the public hearing is to be held. The advertisement shall be no less than one-quarter page in size and shall have a caption in capital letters in a type no smaller than twenty-four-point stating "a public hearing shall be held to consider adoption of a taxing procedure to increase your property taxes". Such advertisement shall be in a type no smaller than eighteen-point and shall not be placed in that portion of the newspaper in which legal notices and classified advertisements appear. Such advertisement shall state that such board will hold a public hearing, at a time and place fixed in the advertisement, and the purpose of such hearing and shall apprise the general public of its right to attend the hearing and make comments regarding the proposed matter.

(2) (a) No later than September 15 of the year prior to the budget year under consideration, the county assessor shall certify the total valuation for assessment of all taxable property located within the territorial limits of such taxing entity.

(b) No later than October 1 of the year prior to the budget year under consideration, the county assessor of the county in which is located a taxing entity adopting the public disclosure provisions of this section shall certify the following to such taxing entity: The mill levy which when applied to such valuation for assessment, exclusive of the increased valuation for assessment attributable to annexation or inclusion of additional land, the improvements thereon, and personal property connected therewith within the taxing entity for the preceding year, or attributable to increased volume of production for the preceding year by a producing mine if said

mine is wholly or partially within the taxing entity and if such increase in volume of production causes an increase in the level of services provided by the taxing entity, or attributable to previously legally exempt federal property which becomes taxable, will raise the same property tax revenue as was raised the preceding year. For the purposes of this section, such mill levy shall be known as the "certified mill levy".

(3) Any taxing entity adopting the public disclosure provisions of this section which proposes to impose a mill levy in excess of the certified mill levy computed pursuant to subsection (2) of this section shall hold a public hearing on such increased mill levy prior to imposing such increased mill levy. No such taxing entity may impose a mill levy which is in excess of such certified mill levy until a resolution has been approved, at a public hear-

ing, by the governing board of the taxing entity, which resolution shall be approved by such board according to the procedure set forth in this section.

(4) The governing board of the taxing entity adopting the public disclosure provisions of this section shall advertise the intent of the taxing entity to exceed the certified mill levy in a newspaper published within the taxing entity, and, if there is no newspaper published within the taxing entity, then by publication in a newspaper published within the county which has general circulation within the taxing entity. Such advertisement shall appear twice, and the second such appearance shall not be more than eight days prior to the date upon which the public hearing is to be held. The advertisement shall be no less than one-quarter page in size and shall have a caption in capital letters in a type no smaller than twenty-four-point stating "a

public hearing shall be held on a proposal to increase your property taxes", and the advertisement shall be in a type no smaller than eighteen point and shall not be placed in that portion of the newspaper in which legal notices and classified advertisements appear. Such advertisement shall state that such board will hold a public hearing, at a time and place fixed in the advertisement, for the purpose of considering an increased mill levy and explaining the reasons for such increase and shall apprise the general public of its right to attend the hearing and make comments regarding the proposed increase. The advertisement shall set forth the amount of the budget and the amount of the property tax revenue for the prior budget year, the current budget year, and the proposed budget year and, in addition, shall set forth the percentage increases between such budget years.

(5) Any public hearing held pursuant to

this section shall be open to the general public. An opportunity shall be provided for all persons to present oral testimony within such reasonable time limits as shall be set by the board conducting the hearing.

(c) Prior to the conclusion of the public hearing or at a subsequent public hearing after advertising such hearing as provided in subsection (4) of this section, the governing board of the taxing entity shall determine the mill levy to be imposed and publicly announce the percent, if any, by which the adopted mill levy exceeds the certified mill levy computed pursuant to subsection (2) of this section. Prior to the conclusion of the hearing at which such determination and announcement are made, such board shall adopt a resolution setting such mill levy. The mill levy set in the resolution shall be the mill levy which is certified pursuant to section 39-5-128, C.R.S.

(7) If, after the adoption of the resolution pursuant to subsection (6) of this section, changes occur in the valuation for assessment, the governing board of the taxing entity shall make such adjustment in the mill levy set in such resolution as is necessity in order to raise the approved amount of revenue.

(8) This section shall not apply to special districts or any other form of district, authority, or area whether or not created by the governing body of a county, city and county, city, or town or by elector, taxpayer, or property owner approval or petition, such as, law enforcement authorities, disposal districts, county public improvement districts, county recreation districts, municipal sewer districts, urban renewal authorities, and downtown development authorities. This section shall not apply to property tax revenue which is raised by or on behalf of any such district,

authority, or area, unless the amount of such property tax revenue raised on behalf of any such district, authority, or area is determined and raised by the governing body of a taxing entity as defined in subsection (1) of this section and is separately listed in the notice required by subsection (4) of this section.

(10) This section is repealed, effective January 1, 1990.

29-1-304. Funding for state-mandated programs. (1) Every action by the general assembly which mandates a new program or the expansion of an existing program subsequent to July 1, 1981, upon a unit of local government shall either.

(a) Provide sufficient state general fund appropriations to meet the cost thereof; or

(b) Provide for a local source of revenue to meet the cost thereof.

(2) Nothing in this section shall be

construed to supersede any revenue-raising or spending limitation imposed by this part 3 or any other provision of law on the state or any unit of local government nor to require the funding of any program in excess of appropriations made therefor by the general assembly or the unit of local government responsible for such funding.

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29-9-101. Public meetings. (1) All meetings of any board, commission, committee, or authority of a political subdivision of the state supported by law in its activities in whole or in part with public funds are declared to be public meetings and open to the public at all times; but such groups, by majority consent of members present, may go into executive session for consideration of documents or testimony given in confidence but shall not make final policy decisions, not shall any resolution, rule, ordinance, regulation, or

formal action or any action approving a contract or calling for the payment of money be adopted or approved at any session which is closed to the general public.

(2) Any action taken contrary to the provisions of subsection (1) of this section shall be null and void and without force or effect.

(3) Notwithstanding any provision of subsection (1) of this section, a board of education of a public school district and the governing body of any municipality, county, or special district may meet in executive session to determine its position relative to issues that may be subject to negotiation, to receive reports on negotiations progress and status, to develop strategy, and to instruct its negotiators.

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39-1-113. Abatement and refund of taxes.

(1) No abatement or refund of taxes as provided for in section 39-10-114, shall be

made by the board of county commissioners unless a hearing is had thereon, at which hearing the assessor shall have the opportunity to be present.

(2) Whenever any abatement or refund in an amount of five hundred dollars or less is recommended by the board of county commissioners, the board shall order the abatement of taxes pro rata for all levies applicable to such property, or, in the case of a refund, the board of county commissioners shall order the refund of taxes pro rata by all taxing jurisdictions receiving payment thereof.

(3) Whenever any abatement or refund in an amount in excess of five hundred dollars is recommended by the board of county commissioners, an application therefor, reciting the amount of such abatement or refund and the grounds upon which it should be allowed, shall be submitted to the administrator for his review pursuant to sec-

tion 39-2-116. If an application is approved, the board of county commissioners shall order the abatement of taxes pro rata for all levies applicable to such property, or, in the case of a refund, the board of county commissioners shall order the refund of taxes pro rata by all taxing jurisdictions receiving payment thereof.

(4) In no case shall an abatement or refund of taxes be made more than six years after the taxes were due.

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39-10-114. Abatement, cancellation of taxes. (1) (a) (I) (A) If taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, or clerical error, the treasurer shall report the amount thereof to the board of county commissioners, which shall proceed to abate such taxes in the manner provided by law. If such taxes have been collected by the treasurer, the

board of county commissioners shall authorize refund of the same in the manner provided by law. However, except as otherwise provided in this sub-subparagraph (A), in no case shall an abatement or refund of taxes be made more than six years after the taxes were due. No abatement or refund of taxes based upon the ground of errors in valuation shall be made for taxes levied prior to January 1, 1988; except that this provision shall not apply to any valuation which is the subject of an appeal made pursuant to section 39-8-108 which, on May 23, 1988, is pending or upon which a final order or judgment has been issued. On or after January 1, 1990, in no case shall an abatement or refund of taxes be made unless a petition for abatement or refund is filed within one year of the date upon which the taxes were due or within one year of the issuance of a final order or judgment in an appeal filed pursuant to section 39-8-108,

whichever is later. For purposes of this sub-subparagraph (A), "clerical error" shall include, by shall not be limited to, any clerical error made by a taxpayer in completing personal property schedules pursuant to the provisions of article 5 of this title.

(B) The assessor shall certify the proportional amount of the total amount of abatements and refunds granted pursuant to the provisions of this section to the appropriate taxing entities at the same time that the certification of valuation for assessment is made pursuant to the provisions of section 39-5-128. Any taxing entity may adjust the amount of its tax levy authorized pursuant to the provisions of section 29-1-301, C.R.S., by an additional amount which does not exceed the proportional share of the total amount of abatements and refunds made pursuant to the provisions of this section. After calculating

the amount of property tax revenues necessary to satisfy the requirements of the "Public School Finance Act of 1988", article 53 of title 22, C.R.S., any school district shall add an amount equal to the proportional share of the total amount of abatements and refunds granted pursuant to the provisions of this section prior to the setting of the mill levy for such school district. Any additional amount added pursuant to the provisions of this subsection (3) shall not be included in the total amount of revenue levied in said year for the purposes of computing the limit for the succeeding year pursuant to the provisions of section 29-1-301, C.R.S. Where a final determination is made granting an abatement or refund pursuant to the provisions of this section after the certification of tax levies in any given year, the abatement or refund granted shall be payable upon payment of property taxes for the property tax

year immediately following said final determination. For the purposes of this sub-subparagraph (B), a taxing entity's proportional share of the total amount of abatements and refunds granted shall be based upon the amount of tax levied by a taxing entity on such real property in proportion to the total amount of tax levied on such real property by such taxing entities.

(C) The change or adjustment of any ratio of valuation for assessment for residential property pursuant to the provisions of section 39-1-104.2 shall not constitute grounds for abatement of taxes as provided in sub-subparagraph (A) of this sub-paragraph (I).

(b) Any taxes illegally or erroneously levied and collected, and penalty interest thereon, shall be refunded pursuant to this section, together with refund interest at the same rate as that provided for penalty interest set forth in section 39-10-104.

Said refund interest shall accrue only from the date payment of taxes and penalty interest thereon was received by the treasurer

(2) (a) Any taxes levied on personal property which are determined to be uncollectible after a period of six tears after the date of their becoming delinquent may be cancelled by the board of county commissioners; except that taxes levied on any mobile home which after diligent search by the treasurer are determined to be uncollectible due to removal of the mobile home from the county or other valid reason may be referred to the board of county commissioners for deletion from the tax rolls after a period of one year.

(b) When any real property has been stricken off to a county by virtue of a tax sale and there has been no transfer by the county of a certificate of purchase thereon, the taxes on such property may be dete-

rmined to be uncollectible after a period of six years from the date of becoming delinquent, and they may be cancelled by the board of county commissioners. Such cancellation shall not affect the rights of the county under Article 11 of this title to subsequently transfer any tax sale certificate nor its right to receive a tax deed and to exercise its rights thereunder with respect to such property.

(3) The treasurer shall keep a complete record of all taxes abated, refunded, or determined to be uncollectible and cancelled by the board of county commissioners as provided in subsection (2) of this section. The treasurer shall file an annual report with the administrator by March 1 of each year, which shall include all taxes abated, refunded, or determined to be uncollectible and cancelled. Such report shall include the name of each owner of taxable property granted such abatement, refund, or cancel-

lation of property taxes, the amount of property taxes abated, refunded, or cancelled, and the date such abatement, refund, or cancellation was granted.

Supreme Court, U.S.
FILED
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(3)

CASE NO. 91-1661

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL FERRIS,

Petitioner,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF MESA, STATE OF COLORADO; RICHARD C. POND IN HIS CAPACITY AS MEMBER OF SAID BOARD AND INDIVIDUALLY; MAXINE ALBERS AND R.W. HOLMES IN THEIR RESPECTIVE CAPACITIES AS MEMBERS OF SAID BOARD AND INDIVIDUALLY.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS, DIVISION III

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

(As Stated By Petitioner)

Whether the unlawful imposition of a general property tax by legislative act of a board of county commissioners violates a citizen's right to a republican form of government as guaranteed by Article IV, Section 4 of the United States Constitution for which a citizen's right to petition for redress may not be impaired.

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COME NOW the Respondents (collectively referred to herein as "Mesa County" or "County") and request that the Court deny certiorari and the requested additional declaratory and injunctive relief.

I. STATEMENT OF JURISDICTION

Petitioner attempts to invoke jurisdiction of this Court under 28 U.S.C. § 1257.[1] Petitioner has failed to bring himself under the provisions of this statute. An allegation that a tax is illegal or contrary to state statute and in violation of rights secured under United States law must be both specifically argued and determined in the state court against the entitlement

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[1]Petition, p. 2

under United States law. Otherwise, there is no United States Supreme Court jurisdiction. Smith v. Hunter, 48 U.S. 738 (1849).

A general allegation that the governmental action complained of is contrary to the United States Constitution or laws is not sufficient. Harding v. Illinois, 196 U.S. 78 (1904). The question must be clear, based on distinct averments, and not mere formal statements implicating federal law. Norton v. Whiteside, 239 U.S. 144 (1915). In Charleston Federal Savings & Loan Assn. v. Alderson, 324 U.S. 182 (1945) at p. 185, it was stated that,

> "it is essential to our jurisdiction . . . that there be explicit and timely insistence in the state court that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws... It has long been settled that an attack upon a tax assessment or levy, such as [appellant] here made, on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal...".

Even where the request is for certiorari and not an appeal, the case may be dismissed for failure to raise the federal question. In Cardinale v. Louisiana, 394 U.S. 437 (1969),

> "... the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that this court will not decide federal constitutional issues raised here for the first time on review of the state court decisions. (citations omitted)."

Furthermore, this is a tax case, which, as argued below, requires exhaustion of administrative remedies to properly bring even constitutional questions before this Court. The record cited in the Petition at p. 13 as raising the question, reveals that Petitioner is relying upon the Complaint which was stricken by order of the Mesa County District Court on May 8, 1989.[2] The Brief before the Colorado Court of Appeals (reference

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[2]Record, Vol. I, pp. 129-130

made at Petition, p. 26, footnote 40) contains mere reference to federal law which would not be sufficient under the cases cited herein. Similarly, no federal law claims were made in the application for writ of certiorari from the Colorado Supreme Court. The state court decisions do not even imply reliance upon any aspect of a federal law.[3]

Petitioner has raised, for the first time, the guarantee of a republican form of government. The court will not decide such issues, even on *certiorari*, Cardinale, *supra*, p.3, at 438. The Petition does not direct the Court's attention to any place in the record where the specific question was raised. Ferris asserts that the question of a republican form of government, and the implicated private right to petition, was decided by the Court of Appeals decision.[4] A review

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[3]Petition Appendix, pp. 1a - 30a.

[4]Petition, p. 30

of the Court of Appeals decision[5] reveals no federal question was involved. 28 U.S.C. § 1257 requirements have not been met and certiorari should not be granted.

II. STATEMENT OF THE CASE

Throughout the Petition, Ferris directs the Court to both adjudicated facts and his version of the facts. Mesa County respectfully submits the following as additional facts for the Court's understanding of the case, and directly disputes certain allegations contained in the Petition.

This case was brought as a declaratory judgment action challenging the legality of an increased property tax implemented by the Mesa County Board of County Commissioners pursuant to a

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[5]Petition Appendix, pp. 1a-14a

public disclosure "truth in taxation" process under 29-1-303 12A C.R.S.[6]

A. Factual Background

In the fall of 1988, Mesa County began its budget preparations for the following fiscal year. At that time, the County had been forced to freeze all hiring, as well as lay off employees. In addition, the County had stipulated to constructing a new jail by the end of 1991 in a federal court action, Lechleiter v. Williams, *et al.* 80 M 561 (D. Colo.). The County needed to increase its revenues above the 5 1/2 percent limit of revenue increase over the preceding year revenues collected. This revenue limit appears in 29-1-301, 12A C.R.S.[7]

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[6]Petition Appendix, p. 60a *et seq.*

[7]Petition Appendix, p. 40a et seq.

In order to raise the necessary revenues the County decided to implement the "truth in taxation" procedures under

29-1-303, 12A C.R.S..[8] Under that statute, a taxing entity must give notice of and conduct two separate hearings. After each hearing, the entity must adopt appropriate resolutions. The first hearing is to decide to use the process and the second to establish the mill levy.

On September 10 and 15, 1988, the County published a Notice of Public Hearing[9] in the local newspaper advertising that a hearing would be held on September 20, 1988, regarding a proposal to increase property taxes through the procedures authorized by § 29-1-303. At the hearing, members of the public expressed their opinion and commented on

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[8]Petition Appendix, p. 60a *et seq.*

[9]Record, Exhibit 1, B

the proposal. At the conclusion of the hearing, the County adopted Resolution No. MCM 88-99,[10] whereby Mesa County indicated its intent to follow the procedures outlined in § 29-1-303.

On November 14 and 17, 1988,[11] the County published a Notice of Public Hearing advising that a second hearing would be held on November 22, 1988. The hearing was held as scheduled and after several hours of public comment and discussion, the Board voted on and announced that the hearing would be continued until 7:30 p.m., November 25, 1988. The County then published two notices of the continued hearing in the local newspaper on November 24 and November 25.[12] At the conclusion of the continued hearing on November 25, the County adopted

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[10]Record, Exhibit 1, K

[11]Record, Exhibit 1, MM

[12]Record, Exhibit 1, NN

Resolution No. MCM 88-127,[13] whereby the County approved an additional 4 mills above the 5 1/2 percent revenue cap. The increase brought the 1989 County levy to 19.502 mills, and generated an additional $2,291,529 for the County in 1989.

Ferris is a real property owner in Mesa County, Colorado. Ferris received a tax notice for taxes assessed in 1988 and due and payable in 1989. Ferris initially refused to pay approximately $268 of the taxes due, which he attributed to the additional four mill levy adopted by the County. Ferris failed or refused to seek relief through the procedures for an abatement or refund of these taxes under §§ 39-1-113[14] and 39-10-114[15], 16B C.R.S. These statutes provide administrative remedies to property owners who believe a tax

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[13]Record, Exhibit 1, OO

[14]Petition Appendix, p. 70a

[15]Petition Appendix, p. 71a

has been levied erroneously or illegally due to irregularity in levying.

B. Case Below

Ferris filed suit for injunctive and declaratory relief in state court. On November 8, 1989, the trial court held a hearing to consider plaintiff's Motion for Preliminary Injunction. At that hearing, the trial court also considered the County's "Alternative Motion for Judgment on the Pleadings and/or Summary Judgment."[16] The court repeatedly instructed Ferris to present evidence or testimony that he had exhausted his administrative remedies prior to filing suit.[17] Ferris admitted that he had not exhausted any administrative remedies but argued that such a requirement was inapplicable. The court granted the

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[16]Record, Vol. I, pp. 298-342

[17]Record, Vol. III, pp. 106-107

County's Motion for Judgment on the Pleadings and/or Summary Judgment and orally denied Ferris' Motion for Preliminary Injunction.[18] The trial court specifically found the notice of the continued hearing was adequate.[19] Ferris then made an oral motion for reconsideration of the trial court's decision.

On November 14, 1989, the trial court issued its written order granting County's Alternative Motion for Judgment on the Pleadings and/or Summary Judgment on the sole basis that Ferris had failed to exhaust his administrative remedies. The court dismissed the action with prejudice, and denied Ferris' Motion for Reconsideration.[20]

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[18]Record Vol. III, pp. 107-108, 112

[19]Petition, p. 16, quoting Record Vol. III, p. 110 at ll. 15-20

[20]Record, pp. 424-425 pp. 6 & 7

C. Legal/Factual Disputes

Ferris contends that he has proven as facts 1) notices given by the County were invalid, and 2) that both 29-1-301 and 303, 12A C.R.S. apply. The trial court ruled against Ferris, holding that 29-1-301 was inapplicable,[21] and that notice was proper or even in excess of requirements.[22]

Ferris failed to raise the issue that any rulings implicated any federal rights. Prior to this petition, Ferris has never appealed any lower court decision based on a violation of any federal rights.

Contrary to Ferris' assertions[23] the provisions of Colorado's open meetings law, § 24-6-402, 10A C.R.S.[24] (1988 Rep. Vol.), did not apply to the County

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[21]Petition Appendix, pp. 15a - 16a

[22]Petition Appendix, p. 17a

[23]Petition, p. 3, 14, 15, 20-22

[24]Petition Appendix, pp. 32a-40a

in this case. The trial court correctly so held.[25] The ruling is supported by the 1991 amendments to 24-6-401 *et seq.*, 10A C.R.S., which now specifically includes by name governmental entities such as counties and municipalities.

Ferris asserts 29-9-101, 12A C.R.S.[26] was violated.[27] He points to Commissioner Pond's testimony as indicative of a violation of the law;[28] however, the trial court ruled there was no violation of the statute,[29] and that no action was taken outside the public meeting.

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[25]Petition p. 20, and Petition, Appendix, p. 16a

[26]Petition Appendix, p. 70a

[27]Petition p. 20; statute set out at Petition Appendix 70a

[28]Petition Appendix, p. 20

[29]Petition, Appendix, p. 16a

III. ARGUMENT - REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT:

As shown below, Ferris has alleged no question encompassed within his stated issue which has not been decided in prior decisions of this Court against his contentions and theories. He has brought forth no theory showing the case has any factor enumerated in S.Ct. Rule 10 supporting a grant of a writ of certiorari.

Ferris has framed the question[30] as a denial of his right to a republican form of government as guaranteed by Article IV Section 4 of the United States Constitution. He attempts to raise due process and equal protection claims, but further admits those claims are "tangential".[31]

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[30]Petition, pp. i, 32

[31]Petition, p. 31

In short, Ferris asserts that a deliberated decision by a duly elected quasi-legislative body to levy a tax increase allowed by statute is not government by republican form of government. He claims[32] to state a challenge to the legality of governmental conduct and the tax as a tax, and that he has asserted a justiciable question under Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

The issue as posited by him is clearly a political question which is not subject to court review. Ferris has failed to exhaust his administrative remedies, as required under well-established law. Ferris has not brought himself within the ambit of 28 U.S.C. § 1257 because he failed to make the required explicit and timely insistence in the state courts that the state statute, as applied, is repugnant to the federal Constitution, treaties or laws. Finally, the relief he

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[32]Petition, p. 33

pretends to request on behalf of others is not his to request. Respondents also point out what Respondents believe are mis-statements of fact contained in the Petition.

Petitioner Ferris' entire Petition for Writ of Certiorari is founded on a single presumption, that the tax levy is illegal. The legality of the levy has never been adjudicated because Ferris has refused to pursue and exhaust administrative remedies provided by the state statutes.

A. PETITIONER HAS NOT BROUGHT FORTH A JUSTICIABLE QUESTION CONCERNING THE REPUBLICAN FORM OF GOVERNMENT.

The action of the respondents did not infringe upon Ferris' right to a republican form of government nor did it create a justiciable question under Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).[33]

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[33]Petition, p. 33

Ferris is asserting a non-justiciable political question as did the Pacific Telephone Company. He does not claim he was "denied an opportunity to be heard as to the amount he was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of (his) constitutional rights." Pacific States Telephone at 150. Ferris is challenging the political judgment of the elected board of county commissioners who decided it was necessary to raise taxes to build the federally-ordered jail. These are political, not judicial questions, which cannot be resolved by the courts. Ohio ex rel. Bryant v. Akron Metropolitan Park District, et al., 281 U.S. 74 (1930). Ferris' reliance on Minor v. Happersett, 88 U.S. 162 (1875) is misplaced. Under that case, states are allowed to establish their own parameters for participation in the republican form of government of that state. Colorado has done so through 29-1-303, which empowers the

elected board to enact mill levy increases following public comment. Petitioner has failed to show any way in which he was denied the republican form of government guaranteed under the United States Constitution. In In re Duncan, 139 U.S. 449 (1891), p. 461, the Court discussed the republican form of government and stated, "The distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies...." Ferris has failed to allege that anything different than republican government action took place.

B. PETITIONER HAS FAILED TO OVERCOME THE REQUIREMENTS OF EXHAUSTION OF ADMINISTRATIVE REMEDIES AND HAS FAILED TO PURSUE THOSE REMEDIES.

State and federal courts have determined repeatedly that exhaustion of administrative remedies requirements are constitutional. Ferris can be held to those administrative remedies because he has standing before those agencies and does not need to resort to the courts. Louisiana Land and Exploration Co. v. Pilot Petroleum Corp. 900 F.2d 816 (5th Cir. 1990), *cert. denied sub nom.* Alabama Dept. of Revenue v. Pilot Petroleum Corp., No. 90-254 (111 S.Ct. 248, 112 L.E.2D 207).

In addition to attempting to avoid administrative remedies, Ferris has requested injunctive relief.[34] Both of these contentions are clearly and distinctly disposed of in Singer Sewing Machine Co. v. Bendict, 229 U.S. 481 (1913). The court held that the predecessor to 39-10-114, 16A C.R.S., was a complete and adequate remedy against erroneous or illegal

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[34]Petition, p. 51

taxes, and that, following application to the board of county commissioners, the taxpayer would have access to an action at law in the courts. (Singer, p. 486 and 487).

The court summarized the law: "It has been held uniformly that the illegality or unconstitutionality of the state or municipal tax or imposition itself is not a ground for equitable relief in the courts of the United States" (at 485). "...even had it (special circumstances calling for equitable relief) been it would have been unavailing unless founded upon something more than the charge that no notice was given...." (at 488).

The policy consideration for implementing the doctrine is set forth in State Railroad Tax Cases, 92 U.S. 575 (1876), where it is said,

> "The policy of non-interference by the courts with the process of collecting the taxes on which the State depends for its continued existence is founded in the simple philosophy derived from the

> experience of ages, that the payment of taxes has to be enforced by a summary constringent means against a reluctant and adverse sentiment; and to do this successfully other instrumentalities and other modes of procedure are necessary than those which belong to the courts of justice."

By analogy, decisions under the Tax Injunction Act, 28 U.S.C. § 1341 indicate that the non-intervention policy bars even claims that the tax is illegal and unconstitutional e.g. Groff v. Maryland, 639 F. Supp. 568 (D.C. Md. 1986). The question is whether or not the state procedures will provide a taxpayer with the opportunity for a full hearing and judicial determination at which he may raise any and all constitutional objections to the tax (test announced in Rosewell v. La Salle Nat. Bank, 450 U.S. 503, 514 (1981 *reh den* Rosewell v. La Salle Nat. Bank, 451 U.S. 1011 (1981)). Ferris has given no reasons why he cannot avail himself of the statutory process. These cases

make clear that the remedies afforded under the Colorado abatement and refund procedures are sufficient.

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, etc., 496 U.S. 18, 110 L.Ed. 2d 17 (1990), cited by Petitioner, does not change this result. Contrary to Ferris' argument,[35] McKesson does not give any 14th Amendment due process right to prospective relief. McKesson holds retrospective relief is sufficient.

The Colorado abatement and refund process provides an annual opportunity for individual property taxpayers[36] to have their tax assessments reviewed and retrospective relief entered. If the tax were declared illegal, the board then sitting can reduce or eliminate the levy as to all taxpayers.

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[35]Petition, p. 49

[36]Petition, p. 49

Even though annual action might be required of a petitioner until there is a determination of the underlying question, that fact alone does not mean the proffered remedy is not effective. Rosewell, *supra*, p. 21. Furthermore, to presume that a resolution would not be forthcoming and that petitioner would have to engage in repetitious action and multiple suits involving identical issues against the same defendant would be to presume that the administrative and judicial appeals are entirely unavailing. Such presumptions should not be made.

The doctrine of exhaustion of administrative remedies is well established. Ferris cites McKart v. United States, 395 U.S. 185 (1969), in support of his proposition that he does not have to go through the abatement and refund process. Nothing in this case invokes a McKart-like exception to the exhaustion doctrine as Ferris argues. This Court did not require

McKart to exhaust those remedies because all administrative remedies were closed to him. Here, administrative remedies have been and are still available (within statutes of limitation) to Ferris.

McKart also states that, "...The doctrine provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted....' Perhaps the most common application of the exhaustion doctrine is in the cases where the relevant statute provides that certain administrative procedures shall be exclusive." McKart, p. 193. A defendant may be successful in front of the administrative process and may never have to invoke court intervention. Colorado provides the statutory administrative process in 39-1-113 and 39-10-114[37] to which the petitioner has been directed.

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[37]Petition Appendix, p. 60a

Requiring Ferris to go through the abatement and refund process will provide as panapoly of remedies to him. Features of exhaustion of administrative remedies are that the administrative agency has an opportunity to review and correct its own mistakes (McKart, p. 195); and to provide findings and other information which will assist a court in deciding a question (McKart, p. 199). By not exhausting remedies, Ferris has attempted to prevent review by the Respondent Board of County Commissioners, sitting as a quasi-judicial body, of its legislative act. The Board can determine if any remedy is appropriate. Ferris even asserts[38] that the administrative procedure requirement wrongs him by giving the Board an opportunity to correct prior action if necessary[39]. Further, Ferris is not foreclosed from the courts: he can

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[38]Petition, p. 40

[39]Petition, p. 44

obtain court review if he would follow the administrative processes.

If Ferris would commence the administrative procedures[40] available to him, he would enjoy the following reviews: First, he would file a petition which the treasurer then reports to the board of county commissioners. If the treasurer's report is that the taxes have been levied erroneously or illegally, the board would abate the taxes and provide refunds of taxes paid. The board must hold a hearing before issuing such abatement or refund under 39-1-113. Since the question of the legality of the levy is clearly at issue, the Board would decide the issue.

If the abatement or refund is in excess of (now) $1,000.00, the refund is reviewed by the State Property Tax Administrator, and if rejected, may be appealed by the taxpayer to the State Board of Assessment Appeals.

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[40]Petition Appendix, p. 71a *et seq.*

If the abatement is of (now) less than $1,000, the amount, with interest, is simply refunded to the taxpayer. If the Board determines that no abatement or refund should issue, the taxpayer would go to court, under law prior to June 9, 1990. After June 9, 1990, 39-10-114.5 provides for an appeal to the State Board of Assessment Appeals, then to the State Court of Appeals.

C. NO DENIAL OF RIGHT TO PETITION

1. Petitioner has enjoyed his rights to petition.

At page 33, Ferris asserts he has been denied his right to petition, or that his right to petition has been impaired. He filed petitions and spoke at meetings.[41] He is apparently confusing the right to petition with some right to have the governing body act in accordance with the desires of the petitioner. "Neither in the First Amendment nor elsewhere in the

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[41]Petition, p. 4 and 5

Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success." Canfora v. Olds, 562 F.2d 363 (6th Cir. 1977) at 364. Ferris contends that the Board's failure to respond amounts to a denial of his right to petition. If a government does not respond to a petition as desired, it is clearly a political question which should be handled through the political process.

2. Alternative processes for obtaining judicial review is not unlawful. Petitioner's rights are protected. The fact Petitioner must exhaust administrative remedies where a non-taxpayer may not have to exhaust administrative remedies does not deny Petitioner access to the courts. Ferris asserts[42] that the exhaustion requirement denies his access to the courts because he, as a taxpayer, is required to exhaust those remedies, where a non-property taxpayer would have

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[42]Petition, pp. 40-43

direct access. He cites no authority supporting the claim that such distinction is unlawful. Ferris' reliance on Bounds v. Smith, 430 U.S. 817 (1977) is misplaced. Bounds does not require a single procedure for all to seek a remedy regardless of particular status (e.g. taxpayer or not). Bounds assures prisoners of facilities, not a procedure, to obtain court review of prisoner law suits.

Ferris has a means to obtain both administrative and eventual judicial review of his particular situation. Louisiana Land and Exploration Co., *supra* p. 19. He attempts to ignore remedies personal to him and claim injury to others who are not before the court, and who have not attempted to come before the court. See Argument D, *infra*, p. 31.

Equal protection under the law does not require that persons not directly affected by the law have access to remedies. If there is any illegality in the pro-

cess followed by the Board of County Commissioners, it would result in a voidable tax levy. The aggrievement is the taxation, and the person paying the tax has standing to challenge a tax and obtain refunds under the administrative procedure. Limiting a remedy to a class, such as a taxpayer, can pass equal protection muster (Louisiana Land, *supra*, p. 19) if the system protects interests (Rosewell, *supra*, p. 21). Ferris has not used the Colorado abatement and refund process and cannot demonstrate any deficiencies in the system.

It is important to note that the other question Ferris asserts has never been decided: none of the courts below have ruled that a person who is not a property taxpayer could not bring the question directly to court. Ferris must enjoy his status as a property owner/taxpayer and exhaust his administrative remedies before coming before the court. Though his

path to court may be somewhat circuitous compared to non-taxpayer's possible path, Ferris nonetheless has a means to go to court if the administrative remedies do not resolve his complaint.

D. PETITIONER HAS NO STANDING TO ASSERT CONSTITUTIONAL CLAIMS ON BEHALF OF OTHERS. Making such claims does not require that a writ issue herein.

Throughout the proceeding, Petitioner has attempted to claim representation of others, or that there is a class to which his resolution of the issue will apply. In fact, Ferris has failed to obtain certification of a class or additional plaintiffs, or otherwise establish any standing on behalf of any person except himself. In another case arising out of Colorado, concerning right to contest zoning which did not affect the appellant, this Court refused certiorari for lack of a substantial federal question. Veterans of Foreign Wars,

Post 4264 v. City of Steamboat Springs, appeal dismissed 439 U.S. 809. The state decision allowed to stand was that remedy in one "status" is sufficient. Veterans of Foreign Wars, 575 P.2d 835 (1978). The same result should enter here.

This court has consistently held there is no standing to assert claims on behalf of others. Clements v. Fashing, 457 U.S. 957, (1982) *reh. den.* 458 U.S. 1133. At p. 966, the Clements court, citing cases, restated the rules that a litigant has standing to challenge the constitutionality of a statute only insofar as it adversely affects his own rights, and "... that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court."[43] Ferris has not alleged any exception to the doctrine

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[43]Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).

which would permit him to attempt to protect rights of others who cannot do so[44] or that others are excluded from challenging statutes,[45] nor that free speech is implicated or stated an overbreadth challenge which would similarly allow review sought on behalf of others.[46]

If Ferris, through abatement and refund, establishes that the tax is illegally levied, other taxpayers may follow through the abatement and refund process, or may use declaratory judgment to obtain their relief from the tax. Board of Assessment Appeals v. Benbrook, 735 P.2d 860 (Colo. 1987).

Whether or not the tax is illegal, Ferris has asserted a political question. All citizens of the

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[44]Diamond v. Charles, 476 U.S. 54, (1986)

[45]Quinn v. Milsap, 491 U.S. 95 (1989)

[46]Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984)

County are entitled to the remedy provided for political questions: They may go to the polls and express their dissatisfaction with the government. There is, therefore, no need for Ferris to complain on their behalf of illegality of the tax or the Board's decision to levy the excess millage.

Similarly, law provides Ferris such remedies in his asserted "statuses" as "citizen/registered elector/property owner/property taxpayer."[47] Except for the electoral process, his entrèe to the system of remedies is abatement and refund. Since he cannot represent others, the fact that he has available to him a remedy establishes that he can enjoy due process and equal protection under the law. Therefore, there is no federal question to be decided under the circumstances presented by Ferris.

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[47]Petition, pp. 5, 24

IV. CONCLUSION

This case, in simplest terms, is an objection to payment of a tax by a taxpayer. State statutes provide an administrative process whereby the taxpayer can test the tax, its amount, the legality of the tax itself, and the underlying levy. Petitioner has failed to exhaust his administrative remedies, even though he has been directed to do so by the state courts. The exhaustion of administrative remedies does not deny the Petitioner any due process of the law or any matter of equal protection. The process of establishing the tax and requiring exhaustion of administrative remedies in no way implicates Petitioner's right to a republican form of government. Therefore, the Petition for Writ of Certiorari, and the request for injunctive and declaratory relief, should not enter.

Respectfully submitted this 11th day of May, 1992.

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